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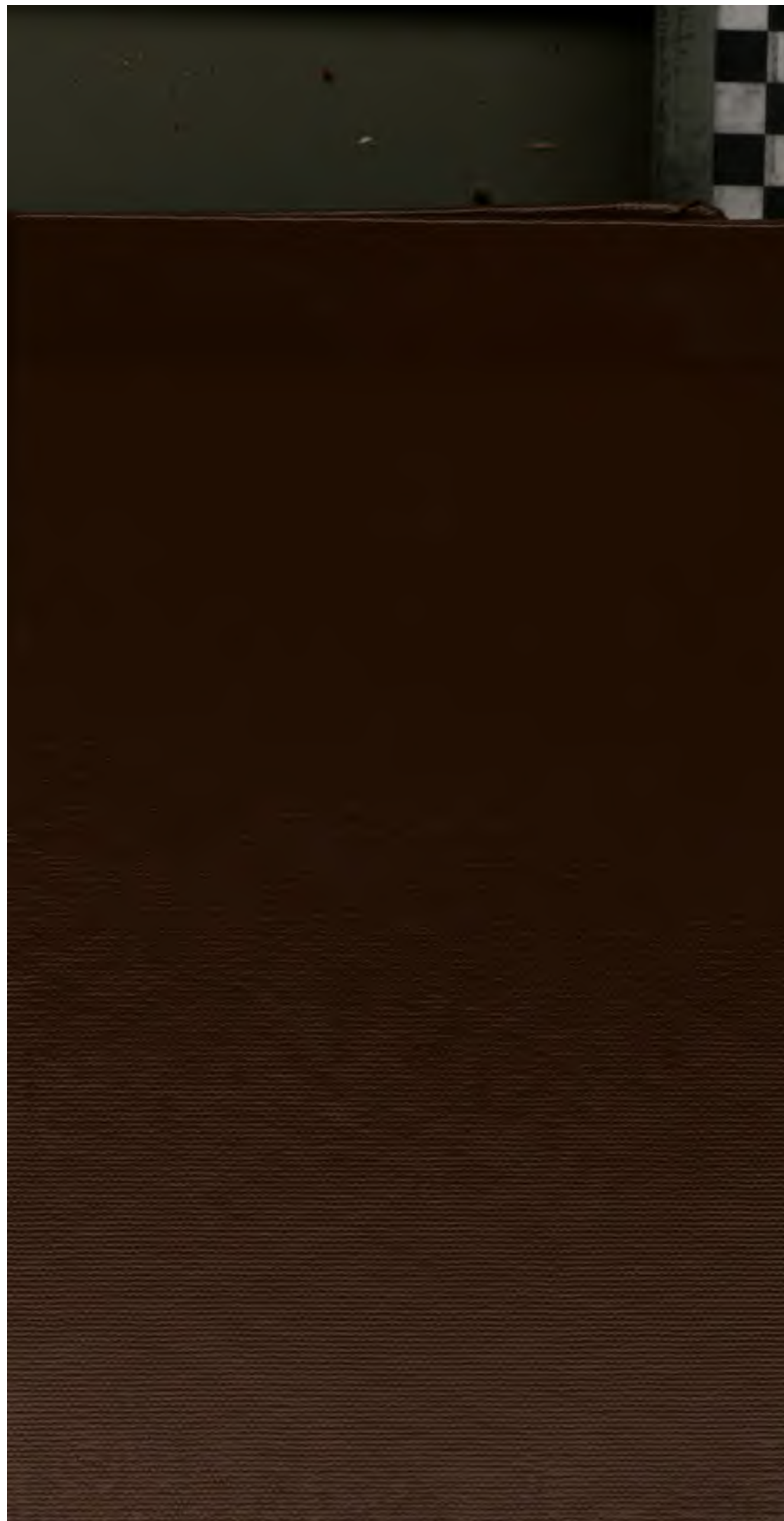
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**A<sup>✓</sup> TREATISE**  
**ON THE LAW OF**  
**REAL PROPERTY**  
**AS APPLIED BETWEEN**  
**VENDOR AND PURCHASER**  
**IN**  
**MODERN CONVEYANCING**  
**OR**  
**ESTATES IN FEE AND THEIR TRANSFER BY DEED**

**BY**  
**LEONARD A. JONES, A. B., LL. B. [HARV.]**  
**AUTHOR OF LEGAL TREATISES**

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**IN TWO VOLUMES**

**VOL. I**

**INDIANAPOLIS—KANSAS CITY**  
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1896

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To  
THE HONORABLE WALBRIDGE A. FIELD, LL. D.  
CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT  
OF MASSACHUSETTS  
AS A MARK OF RESPECT AND ESTEEM  
THIS WORK IS DEDICATED  
BY THE AUTHOR





## PREFACE.

---

THESE volumes treat of the practical parts of the general subject of Real Property which arise in ordinary conveyancing between vendor and purchaser. They do not profess to cover the entire field of Real Property law. It is impossible in two or even three volumes to state the law and give the authorities relating to the entire subject. It is only possible in such compass to state general principles with a meagre citation of authorities. I write now, as I have written heretofore, with the purpose to state with considerable fulness the law of the topics of which I treat,—to state it with such completeness as to make the treatise valuable to the courts and to practising lawyers. Moreover, I have intended to state the law only as it now is, with as little reference as possible to the law that has become obsolete. I have referred to the old law only for the purpose of stating the principles upon which some parts of the present law are founded. The subjects that present the most difficulties and give rise to the most litigation I have discussed with the greatest care. I have cited a great number of cases, and have cited them after examination for their value. The mode of treatment is similar to that I have adopted in my other works.

It will be observed that I take up the subject of Real Property with the consideration of that part of it which is usually made the closing part in other treatises. Instead of beginning with the least possible estates in realty, going up through the larger estates, and finally at the end coming to something about estates in fee and their transfer by deed, I begin with this part of the subject,

#### PREFACE.

and in fact devote these volumes to it wholly. It is the part of the general subject which seems to me to afford the proper approach to all the learning upon it; and, moreover, it is the part of the subject which more than any other is of practical importance.

I have not touched upon the subject of Mortgages of Real Property in these volumes except incidentally, for I have already written upon that subject. If I should hereafter write upon other parts of Real Property law, my writings will be published under separate and specific titles. These volumes are complete in themselves.

L. A. J.

Boston, April 19, 1896.

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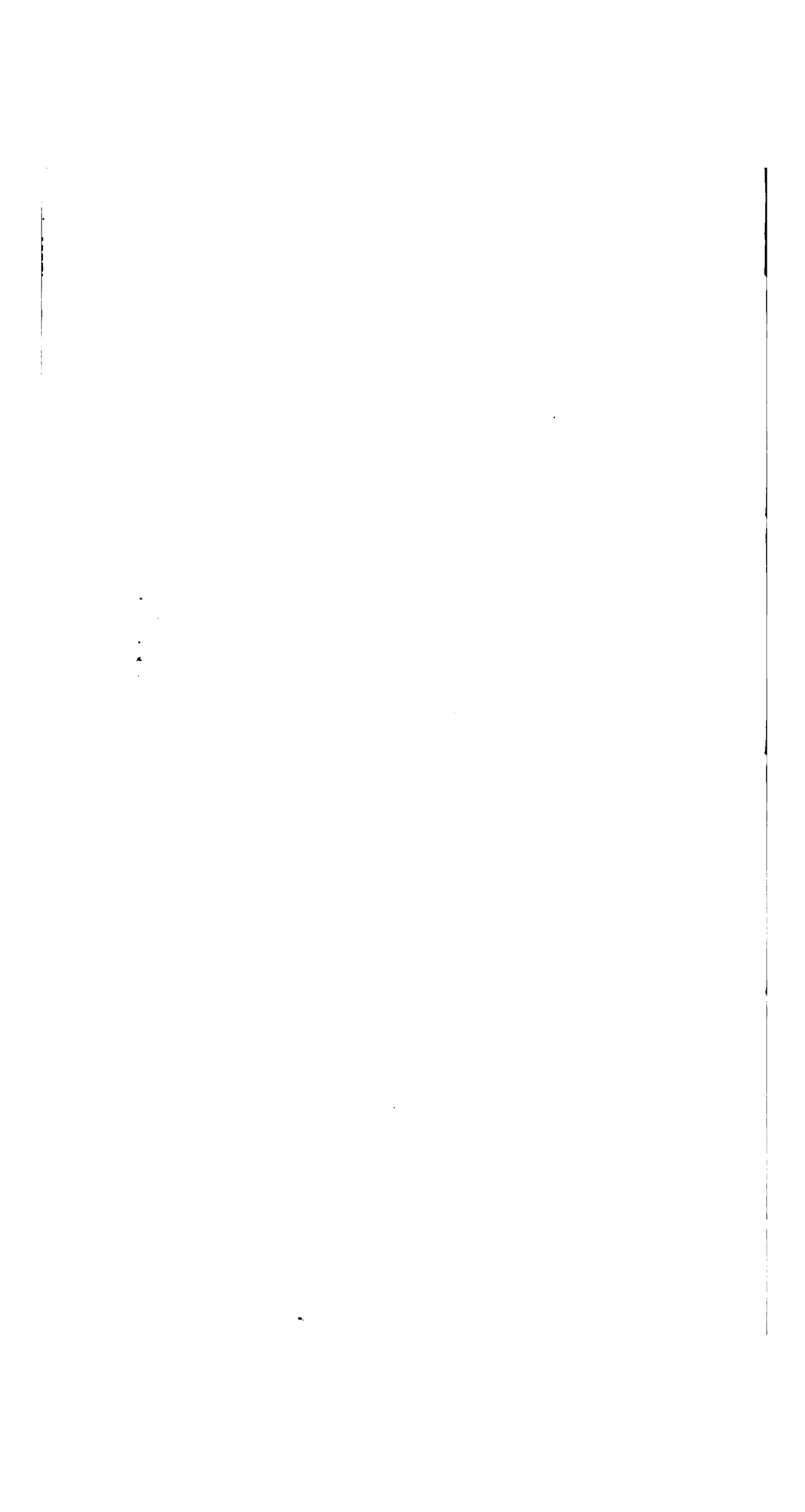
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## **BOOK I.**

**CAPACITY OF PERSONS TO HOLD AND CONVEY LAND.**

## **PART I.**

### **CAPACITY OF PERSONS AS VENDORS.**

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# BOOK I.—PART I.

## CAPACITY OF PERSONS AS VENDORS.

### CHAPTER I.

#### DISABILITY OF INFANTS.

<p>I. Deeds of infants voidable, not void, 2-4.</p> <p>II. No estoppel by declaration of age, 5, 6.</p> <p>III. Disability of married women under age, 7-9.</p> <p>IV. Who may affirm or disaffirm minority, 10-13.</p> <p>V. What amounts to an affirmation, 14-16.</p>	<p>VI. What amounts to a disaffirmance, 17-23.</p> <p>VII. Affirmance from lapse of time, 24-26.</p> <p>VIII. Disaffirmance within a reasonable time, 27, 28.</p> <p>IX. Avoidance of mortgage for purchase-money, 29, 30.</p> <p>X. Restoration of purchase-money, 31-35.</p>
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1. In general any person who has the legal capacity to bind himself by contract may convey his real estate or any interest therein by deed. The power of alienation is one of the usual incidents of ownership, but its existence depends upon the unity of title with capacity to contract. The absolute owner of any estate or interest in land may sell that estate or interest, if he is under no disability. He may also sell a less estate or interest than that which he owns, but he cannot sell a greater estate or interest. Thus a tenant for life or the owner of a limited estate or interest may sell the estate or interest he owns, but if he undertakes to dispose of a larger estate or interest his sale is valid only to the extent of his estate or interest. The same disabilities which incapacitate one from making a valid contract incapacitate him from making a valid deed. These disabilities are either natural, as in the case of insane persons, or legal, as in the case of married women, or either natural or legal, or perhaps both, according to the circumstances of the case, as in the case of infancy. There may also be a legal disability arising from the relation in which a person stands to the property, as in case the property is held in adverse possession; or a legal disability arising from the relation in which the owner stands to the intended purchaser, as in the case of a direct conveyance between husband and wife. The disabilities to be considered, in reference to the capacity of persons to

dispose of property by deed, arise from infancy, coverture, the various kinds and degrees of mental capacity, whether this be from insanity, drunkenness, duress, or undue influence; and finally are to be considered the capacity to convey of owners whose land is adversely held, the capacity of corporations and of tenants in tail.

I. *Deeds of Infants voidable, not void.*

2. The deed of a minor conveying his land for a valuable consideration is voidable, and not void.<sup>1</sup> Formerly various

<sup>1</sup> *Zouch v. Parsons*, 3 Burr. 1794; *Allen v. Allen*, 2 Dr. & War. 307, 338; *Burnaby v. Equitable Revers. Soc.* 28 Ch. D. 416; *Keane v. Boycott*, 2 H. Black. 511; *Irvine v. Irvine*, 9 Wall. 617; *Tucker v. Moreland*, 10 Pet. 58; *Hyer v. Hyatt*, 3 Cranch C. C. 276.

**Alabama:** *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418. **California:** *Hastings v. Dollarhide*, 24 Cal. 195. **Colorado:** *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245. **Connecticut:** *Kline v. Beebe*, 6 Conn. 494; *Rogers v. Hurd*, 4 Day, 57, 4 Am. Dec. 182. **Delaware:** *Wallace v. Lewis*, 4 Harr. 75. **Georgia:** Code 1882, § 2694; *Harris v. Cannon*, 6 Ga. 382; *Nathans v. Arkwright*, 66 Ga. 179. **Illinois:** *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Tunison v. Chamblin*, 88 Ill. 378; *Cole v. Pennoyer*, 14 Ill. 158; *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434. **Indiana:** *Scranton v. Stewart*, 52 Ind. 68; *Pitcher v. Laycock*, 7 Ind. 398; *Law v. Long*, 41 Ind. 586; *Fetrow v. Wiseman*, 40 Ind. 148. **Iowa:** *Green v. Wilding*, 59 Iowa, 679, 13 N. W. Rep. 761, 44 Am. Rep. 696; *Jenkins v. Jenkins*, 12 Iowa, 195. **Kentucky:** *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 245, 19 Am. Dec. 71; *Phillips v. Green*, 3 A. K. Marsh. 7, 13 Am. Dec. 124; *Vallandingham v. Johnson*, 85 Ky. 288; *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. Rep. 447. **Maine:** *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Webb v. Hall*, 35 Me. 336. **Maryland:** *Ridgeley v. Crandall*, 4 Md. 435; *Amey v. Cockey*, 73 Md. 297, 20 Atl. Rep. 1071, per Alvey, C. J. **Massachusetts:** *Kendall v. Lawrence*, 22 Pick. 540; *Boston Bank v. Chamberlin*, 15 Mass. 220. **Minnesota:** *Dixon v. Merritt*, 21 Minn. 196. **Mississippi:** *Allen v. Poole*, 54 Miss. 323. **Missouri:** *Ferguson v. Bell*, 17 Mo. 347; *Peterson v. Laik*, 24 Mo. 541; *Singer Manuf. Co. v. Lamb*, 81 Mo. 221; *Huth v. Carondelet, &c. Co.* 56 Mo. 202; *Baker v. Kennett*, 54 Mo. 82; *Harris v. Ross*, 86 Mo. 89; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. Rep. 906; *Shipley v. Bunn (Mo.)*, 28 S. W. Rep. 754. **Nebraska:** *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. Rep. 852. **New Hampshire:** *State v. Pliasted*, 43 N. H. 413; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38. **New York:** *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Palmer v. Miller*, 25 Barb. 399; *Jackson v. Todd*, 6 Johns. 257; *Jackson v. Carpenter*, 11 Johns. 539; *Flinn v. Powers*, 36 How. Pr. 289; *Voorhies v. Voorhies*, 24 Barb. 150. **North Carolina:** *McCormic v. Leggett*, 8 Jones, 425. **Ohio:** *Drake v. Ramsay*, 5 Ohio, 252. **Pennsylvania:** *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939. **South Carolina:** *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. Rep. 468. **Tennessee:** *Scott v. Buchanan*, 11 Humph. 468; *Hook v. Donaldson*, 9 Lea, 56. **Texas:** *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372, 26 Am. St. Rep. 837; *Stuart v. Baker*, 17 Tex. 417; *Cummings v. Powell*, 8 Tex. 80; *Askey v. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101, 5 Lawyer's Rep. 176. **Vermont:** *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec.

distinctions were taken between void and voidable contracts of infants. It was said that any contract which the court could declare to be to their prejudice was void.<sup>1</sup> For this reason it was held that a conveyance by a minor without consideration is absolutely void, and not voidable merely. But now such distinctions no longer prevail. It is the settled rule that all contracts of infants, whether made personally or by an agent, are voidable instead of void. After coming of age they may ratify and confirm any contract made during minority. Even a deed of gift, or deed without consideration, is voidable rather than void.<sup>2</sup>

Their contracts for necessities to the extent of their reasonable value are valid and require no ratification; and their contracts made in pursuance of statutory authority, or by direction of court, are of course valid. And so are their deeds, executed under such circumstances that the law would have compelled their execution, valid and cannot be avoided.<sup>3</sup> Thus an infant who holds the legal title to real estate in trust may be compelled to execute the trust, and his deed made in pursuance of such obligation cannot be avoided.<sup>4</sup> He cannot disaffirm or avoid his deed in execution of that trust on the ground of his minority, since the execution of the trust was a duty which a court of equity would have compelled him to perform notwithstanding his infancy.<sup>5</sup> An infant

589. *Virginia*: *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381. *West Virginia*: *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

<sup>1</sup> *Keane v. Boycott*, 2 H. Black. 511, per Lord Chief Justice Eyre, approved in some American cases; *Bloomington v. Chittenden*, 74 Mich. 698, 42 N. W. Rep. 166.

<sup>2</sup> *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463; *Oxley v. Tryon*, 25 Iowa, 95; *Harrison v. Adcock*, 8 Ga. 68; *Nathans v. Arkwright*, 66 Ga. 179, 187, 179. In *Tennessee* an infant's voluntary deed is void. *Robinson v. Coulter*, 90 Tenn. 705, 18 S. W. Rep. 250, 25 Am. St. Rep. 708; *Swafford v. Ferguson*, 3 Lea, 292, 31 Am. Rep. 639; *Scobey v. Waters*, 10 Lea, 551, 557.

<sup>3</sup> *Zouch v. Parsons*, 3 Burr. 1794, 1801, per Lord Mansfield; *Tucker v. Moreland*,

10 Pet. 58, 67; *Irvine v. Irvine*, 9 Wall. 617, 626; *Starr v. Wright*, 20 Ohio St. 97; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Bridges v. Bidwell*, 20 Neb. 185, 29 N. W. Rep. 302.

<sup>4</sup> *Sheldon v. Newton*, 3 Ohio St. 494; *Starr v. Wright*, 20 Ohio St. 97; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. Rep. 476; *Trader v. Jarvis*, 23 W. Va. 100; *Prouty v. Edgar*, 6 Iowa, 353; *Bridges v. Bidwell*, 20 Neb. 185, 29 N. W. Rep. 302.

<sup>5</sup> *Zouch v. Parsons*, 3 Burr. 1794, 1801; *Tucker v. Moreland*, 10 Pet. 58, 67; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. Rep. 599; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Starr v. Wright*, 20 Ohio St. 97; *Prouty v. Edgar*, 6 Iowa, 353.

In *Amey v. Cockey*, 73 Md. 297, 20 Atl. Rep. 1071, 1073, *Alvey, C. J.*, seems to be of opinion that this principle applies

may exercise a naked power relating to his own estate, if in the instrument giving the power it is expressly provided, or the intention is indicated, that the power may be exercised during minority.<sup>1</sup>

3. The deed, being voidable only and not void, operates to transmit the title, which can be divested only by some act of the grantor, after he has come of age, disaffirming his deed.<sup>2</sup> He can confirm his deed, and then it is no longer voidable; but in the first instance confirmation is not necessary. It is only when there has been an effort on his part to avoid his deed that it becomes important to inquire whether there has been any act of confirmation which has put it out of his power to disaffirm his deed.<sup>3</sup> No affirmative act is required to continue the validity of his deed, but only the absence of any disaffirming acts.<sup>4</sup>

4. It was formerly said that infants could not delegate their authority to contract, and that in cases where their own deeds would be voidable, yet their deeds made under powers of attorney were absolutely void.<sup>5</sup> The early cases to this effect, both in England and in this country, were numerous. Thus, in an early case in Massachusetts, Chief Justice Parker said: "Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void, although no satisfactory reason can be assigned for such a position. But as this is a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants, it is not necessary nor reasonable to draw inferences which may be repugnant to the principles of justice which ought to reg-

to a deed of partition made by a minor, when the partition is such as a court of equity will sanction; and that, there being nothing to impeach the fairness and equality of the partition, a court of equity will not disturb it.

<sup>1</sup> *Hearle v. Greenbank*, 3 Atk. 695; *Hill v. Clark*, 4 Lea, 405.

<sup>2</sup> *Irvine v. Irvine*, 9 Wall. 617; *Drake v. Ramsay*, 5 Ohio, 252; *Law v. Long*, 41 Ind. 586; *Ihley v. Padgett*, 27 S. C. 300; *Scott v. Buchanan*, 11 Humph. 468.

<sup>3</sup> *Ihley v. Padgett*, 27 S. C. 300, 302, per McGowan, J.

<sup>4</sup> *Singer Manuf. Co. v. Lamb*, 81 Mo. 221.

<sup>5</sup> *Saunderson v. Marr*, 1 H. Bl. 75; *Philpot v. Bingham*, 55 Ala. 435 and cases cited; *Cummings v. Powell*, 8 Tex. 80; *Pickler v. State*, 18 Ind. 266; *Armistage v. Widoe*, 36 Mich. 124; *Fonda v. Van Horne*, 15 Wend. 631, 636, 30 Am. Dec. 77, per Bronson, J.; *Knox v. Flack*, 22 Pa. St. 337; *Lawrence v. McArter*, 10 Ohio, 37, 42; *Pyle v. Cravens*, 4 Litt. 17, 21; *Fairbanks v. Snow*, 145 Mass. 153, 156, per Holmes, J.

ulate contracts between man and man."<sup>1</sup> But this early rule has been limited, if not wholly done away with, by some courts of the highest authority. There is certainly no good reason why such power should not be held to be voidable and not void. If the power is coupled with an interest, as in case of a mortgage with a power of sale, it is not void, but voidable only.<sup>2</sup>

## II. *No Estoppel by Declaration of Age.*

5. A declaration by an infant at the time of the execution of a deed that he was then of age does not estop him at law from taking advantage of his disability after coming of age.<sup>3</sup> "An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed."<sup>4</sup> The infant's disaffirmance of his deed under such circumstances may be a fraudulent act as to the purchaser, but this does not estop him from availing himself of the protection which the law attaches to his condition of disability.<sup>5</sup>

6. This rule is not followed, however, in equity, but a grantor who has falsely declared at the time of executing the deed that he was of full age, and has thus induced the purchaser to accept it, may be estopped by his own fraud.<sup>6</sup> But where this is the rule, the mere failure of an infant at the time of executing a deed to inform a grantee of his disability does not estop him from

<sup>1</sup> *Whitney v. Dutch*, 14 Mass. 457, 462, 7 Am. Dec. 229.

<sup>2</sup> *Askey v. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101, 5 Law Rep. 176.

<sup>3</sup> *Merriam v. Cunningham*, 11 Cush. 40; *Baker v. Stone*, 136 Mass. 405; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Buchanan v. Hubbard*, 96 Ind. 1; *Price v. Jennings*, 62 Ind. 111; *Carpenter v. Carpenter*, 45 Ind. 142; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. Rep. 173; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. Rep. 695, 37 Am. Rep. 412; *Stowell v. Shapter*, 54 N. Y. 249; *Brown v. McCune*, 5 Sandf. 224, 228; *Keen v. Cole-*

*man*, 39 Pa. St. 299, 302, 80 Am. Dec. 524.

<sup>4</sup> *Sims v. Everhardt*, 102 U. S. 300, 313; *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676. See *Utermehle v. McGreal*, 1 D. C. App. 359.

<sup>5</sup> *Tucker v. Moreland*, 10 Pet. 58, 77; *Brantley v. Wolf*, 60 Miss. 420; *Ferguson v. Bobo*, 54 Miss. 121.

<sup>6</sup> *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. Rep. 1089, per Lyon, C. J.; *Davidson v. Young*, 38 Ill. 145; *Schmitheimer v. Eiseman*, 7 Bush, 298; *Brantley v. Wolf*, 60 Miss. 420; *Ferguson v. Bobo*, 54 Miss. 121; *Bradshaw v. Van Winkle*, 133 Ind. 134; *Kilgore v. Jordan*, 17 Tex. 341.



afterwards setting up such disability, if he made no misrepresentation of fact and employed no artifice to mislead the grantee.<sup>1</sup>

If the grantee knew the infant's representation that he was of age to be false, the infant is not estopped from avoiding his deed upon coming of age, so far as the transaction was not for his benefit.<sup>2</sup> "At law it is conclusively presumed that a person within the age of twenty-one is unfitted for business, and that every contract into which he enters is to his disadvantage, and that he is incapable of fraudulent acts which will estop him from interposing the shield of infancy against its enforcement. In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances concerning the transaction — the appearance of the minor, his intelligence, the character of his representations, the advantage he has gained by the fraudulent representations, and the disadvantage to which the person deceived has been put by them — in determining whether he should be permitted to invoke successfully the plea of infancy."<sup>3</sup>

But if one conveying land falsely represents that he is of age, deceives the purchaser, and, after becoming of age, stands by for several years, knowing that the land is being conveyed to subsequent purchasers, he is estopped to disaffirm his conveyance. His misrepresentation as to his age makes his duty the greater to assert his claim seasonably.<sup>4</sup>

<sup>1</sup> *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. Rep. 1089; *Brantley v. Wolf*, 60 Miss. 420.

<sup>2</sup> *Nelson v. Stocker*, 4 De Gex & J. 458, 5 Jur. N. S. 262, 751; *Charles v. Hastedt*, 51 N. J. Eq. 171, 26 Atl. Rep. 564. And see *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206.

<sup>3</sup> *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. Rep. 511, 631. In this case a release made by an infant to his guardian was sustained, but the circumstances of that case were peculiar. The infant there not only made the fraudulent representation as to his age, but he accepted in payment, with the advice and consent of his father, certain lands at a fair valuation, and, in order to obtain those lands, the guardian was obliged to execute a release to a third party, from which he could not be relieved except by returning the lands, and this the

infant had prevented him from doing by conveying some or all of them away to other third parties.

In *Indiana*, one who purchases of a minor, with knowledge of his disability, cannot demand a return of the consideration as a condition precedent to the minor's right to disaffirm. *Shaul v. Rinker* (Ind.), 38 N. E. Rep. 593. The statute of this State, R. S. 1894, § 3365, provides that, in all sales of real estate by an infant, a condition precedent to his right to disaffirm such a sale shall be the restoration to the purchaser of the consideration therefor, if the purchaser, acting in good faith, relied upon false representations by the infant that he was of age, and had good reason to believe such representations to be true.

<sup>4</sup> *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206.

### III. *Disability of Married Women under Age.*

7. A married woman under the age of twenty-one years is subject to the disabilities of infancy,<sup>1</sup> save only in cases where

<sup>1</sup> Infants attain their majority at the age of twenty-one years, except that in the following named States, while the age of majority for males is twenty-one years, for females it is eighteen years: —

**Arkansas:** Dig. of Stats. 1884, § 3464. **California:** Civ. Code, § 25. **Colorado:** Annot. Stats. 1891, § 2081; *Jackson v. Allen*, 4 Colo. 263. **Idaho:** R. S. 1887, § 2405. **Illinois:** R. S. 1889, ch. 64, § 1. **Iowa:** Annot. Code 1888, § 3428. But all minors attain their majority by marriage. **Kansas:** G. S. 1889, § 3868. **Minnesota:** G. S. 1894, § 4534; *Cogel v. Raph*, 24 Minn. 194. **Missouri:** R. S. 1889, § 5278. **Montana:** Comp. Stats. 1887, p. 981, § 1204. **Nebraska:** Comp. Stats. 1893, ch. 34, § 1. But in case a female marries between the age of sixteen and eighteen, her minority ends. **Nevada:** G. S. 1885, § 4943. **North Dakota:** Comp. Laws 1887, § 2509. **Ohio:** R. S. 1892, § 3136. **Oklahoma:** Stats. 1893, § 3600. **Oregon:** G. L. 1892, § 2951. A female is deemed as having arrived at the age of majority upon her marriage. § 2953. **South Dakota:** Comp. Laws 1887, § 2509. **Utah:** 2 Comp. Laws 1888, § 2560. But all minors obtain their majority by marriage. **Vermont:** R. L. 1880, § 2421. **Washington:** G. S. 1891, § 1416. All females married to a person of full age shall be deemed and taken to be of full age. § 1417.

Other provisions as to minority are made in the following named States: —

**Florida:** A relinquishment of dower executed and acknowledged by a wife shall be valid notwithstanding her minority. R. S. 1892, § 1959. **Indiana:** Any married woman over the age of eighteen years, and under the age of twenty-one, may convey her right in and to any lands of her husband, sold and conveyed by him, by executing and acknowledging the execution

of such conveyance, if the father (or, if there be no father, then the mother) of such married woman shall declare, before the officer taking such acknowledgment, that he or she believes that such conveyance is for the benefit of such married woman, and that it would be prejudicial to her and her husband to be prevented from disposing of the lands thus conveyed; which declaration, with the name of such father or mother, shall be inserted as a part of the certificate of the officer taking such acknowledgment. If the infant wife have no parent living, she may join with her husband in conveyance of real estate, with consent of the judge of the circuit court of the circuit where such husband and wife reside. Annot. Stats. 1894, §§ 3359, 3360. **Louisiana:** Minority for both sexes continues till the age of twenty-one years. But a minor, whether male or female, is emancipated of right by marriage. A minor over the age of eighteen years may be relieved of minority on petition to the judge having jurisdiction. Civ. Code 1889, arts. 37, 379, 385. **Maryland:** A married woman, at whatever age she may be, may relinquish her dower in any real estate by the joint deed of herself and husband, or by her separate deed. Pub. G. L. p. 804, § 12. **Pennsylvania:** Every conveyance executed and acknowledged by a wife in conjunction with her husband of his real estate shall be valid and effectual, notwithstanding the minority of the wife. 1 Brightly's *Purdon's* Dig. 1894, p. 635, § 33. **Texas:** A minor over the age of nineteen years may have his disabilities as a minor removed upon petition to the district court showing cause and a decree thereon. For all legal purposes the minor thereupon becomes of full age. 2 Civ. Stats. 1889, art. 3361 *a*. **Wisconsin:** Every married woman of the age of eighteen years and

she is enabled by statute to make a valid conveyance at an earlier age.<sup>1</sup> If she has made a deed or mortgage of her land during her minority, her husband joining in it, she may repudiate it on coming of age, and she is not bound to return the consideration.<sup>2</sup> The fact that she was a mother at the time of executing a conveyance and appeared of full age, and the grantee believed she was of full age when he purchased, does not estop her from showing her infancy, where she made no representations as to her age.<sup>3</sup> Though an infant wife who had joined her husband in the conveyance of her land, the consideration of which was paid to him, had signed a written statement — declared to be made as an inducement to the carrying out of the contract — that she was above the age of twenty-one years, it was held that she might recover the land after she had been divorced from her husband, without paying back any of the consideration.<sup>4</sup>

The disability of infancy is not removed by a proviso in a deed to a married woman that nothing is to prevent her from selling said land if she shall desire to do so and her husband shall unite in the deed.<sup>5</sup>

#### 8. A relinquishment of dower by an infant feme covert by

upwards may bar her dower in any real estate by joining with her husband, or with his guardian, in a conveyance thereof duly executed and acknowledged. Annot. Stats. 1889, § 2222.

<sup>1</sup> *Alabama*: *Greenwood v. Coleman*, 34 Ala. 150; *Schaffer v. Lavretta*, 57 Ala. 14. *Arkansas*: *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1. *Illinois*: *Hoyt v. Swar*, 53 Ill. 134. *Indiana*: 2 R. S. 1888, §§ 2939-2943; *Scranton v. Stewart*, 52 Ind. 68; *Sims v. Smith*, 86 Ind. 577; *Bakes v. Gilbert*, 93 Ind. 70. *Maine*: *Webb v. Hall*, 35 Me. 336. *Massachusetts*: *Walsh v. Young*, 110 Mass. 396. *Minnesota*: 1 G S. 1888, ch. 40, § 2. *New York*: *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Sanford v. McLean*, 3 Paige, 117, 23 Am. Dec. 773. *North Carolina*: *Eppe v. Flowers*, 101 N. C. 158, 7 S. E. Rep. 680. *Ohio*: *Hughes v. Watson*, 10 Ohio, 127. *Pennsylvania*: *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep.

939. *South Carolina*: *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629. *Tennessee*: *Matherson v. Davis*, 2 Coldw. 443; *Scott v. Buchanan*, 11 Humph. 468. *Texas*: *Burr v. Wilson*, 18 Tex. 367; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372, 26 Am. St. Rep. 838.

<sup>2</sup> *Walsh v. Young*, 110 Mass. 396; *Dill v. Bowen*, 54 Ind. 204; *Lozey v. Bond*, 94 Ind. 67; *Magee v. Welsh*, 18 Cal. 155; *Dixon v. Merritt*, 21 Minn. 196.

<sup>3</sup> *Sewell v. Sewell*, 92 Ky. 500, 18 S. W. Rep. 162; *Buchanan v. Hubbard*, 96 Ind. 1. See, however, *Houston v. Houston* (Tex.), 18 S. W. Rep. 688.

<sup>4</sup> *Sims v. Everhardt*, 102 U. S. 300.

<sup>5</sup> *Sewell v. Sewell*, 92 Ky. 500, 504, 18 S. W. Rep. 162; *Pryor, J.*, saying: "This provision does not remove the disability of either infancy or coverture, and she could convey only in the same manner as if that provision in the deed had been omitted."

joining with her husband in a conveyance of his land is voidable by her on arriving at full age, but is operative until avoided.<sup>1</sup> The deed and privy examination of a *feme covert*, taken under modern statutes, have no longer the effect of an assurance of record, like a fine, but may be collaterally impeached, on the ground of infancy or other disability.<sup>2</sup> If a married woman makes a deed of her own land during minority, her husband joining to make the deed valid under a statute so providing, she may disaffirm the deed upon coming of age, and the deed thereupon is avoided also as to the husband.<sup>3</sup> Even under statutes which give a married woman power to disaffirm her deed made during infancy, and to bring an action to recover the land, without the assent and even against the will of the husband, she is not estopped from avoiding her deed by reason of her omission to act for any length of time during her coverture.<sup>4</sup>

9. If the disability of coverture is joined to that of infancy, where the common law relative to the husband's rights in her property prevails, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended; for by the marriage the husband acquired a vested freehold in her lands, and became entitled to the rents and profits as long as the marriage relation might continue. When, therefore, such grantor became of age, she continued powerless to disturb the possession of the grantor, so long as her coverture lasted. An affirmance or disaffirmance necessarily implies the action of a free mind, exempt from all constraint or disability.<sup>5</sup>

<sup>1</sup> *Law v. Long*, 41 Ind. 586; *Priest v. Cummings*, 16 Wend. 617; *Feitner v. Lewis*, 23 Jones & S. 519, 1 N. Y. Supp. 1.

<sup>2</sup> *Epps v. Flowers*, 101 N. C. 158, 7 S. E. Rep. 680; *Wright v. Player*, 72 N. C. 94. Under the statute of 1751, giving the deed of an infant wife acknowledged on a privy examination the effect of a fine and recovery, her deed might be impeached during infancy, but not afterwards. *Kidd v. Venable*, 111 N. C. 535, 16 S. E. Rep. 317.

<sup>3</sup> *Craig v. Von Beber*, 100 Mo. 584, 13 S. W. Rep. 906, 18 Am. St. Rep. 569; *Bagley v. Fletcher*, 44 Ark. 153.

<sup>4</sup> *Miles v. Lingerman*, 24 Ind. 385; *Sims v. Everhardt*, 102 U. S. 300, where *Scranton v. Stewart*, 52 Ind. 68, is criticised, and *Miles v. Lingerman* approved; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Buchanan v. Hubbard*, 96 Ind. 1; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374. In Texas, where a married woman cannot disaffirm by deed without the consent of her husband, but may do so by suit, the court thought the common-law rule should not apply, but still that coverture should be considered in determining what is a reasonable time for a disaffirmance. *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372, 26 Am. St. Rep. 837.

<sup>5</sup> *Sims v. Everhardt*, 102 U. S. 300; *Sims v. Smith*, 86 Ind. 577; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Miles*

IV. *Who may affirm or disaffirm Minority.*

10. An infant cannot affirm or disaffirm his deed during his minority,<sup>1</sup> though the contrary was asserted by some of the early authorities. He may enter and take the profits, if he can, until he has the legal capacity to affirm or disaffirm his deed; but his deed is not thereby rendered void; it may still be confirmed after he is of full age.<sup>2</sup> Before any act of disaffirmance can be adjudged to have effect, it must be shown affirmatively that the grantor was no longer a minor at the time of such disaffirmance.<sup>3</sup>

11. The right of an infant to avoid his deed on coming of age is during his lifetime a personal privilege. A creditor

*v. Lingerman*, 24 Ind. 385; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Wilson v. Branch*, 77 Va. 65, 46 Am. Dec. 709; *Stringer v. Northwestern M. L. Ins. Co.* 82 Ind. 100; *Buchanan v. Hubbard*, 96 Ind. 1; *Stull v. Harris*, 51 Ark. 294, 11 S. W. Rep. 104; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Dodd v. Benthal*, 4 Heisk. 601; *Matherson v. Davis*, 2 Coldw. 443; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629; *Epps v. Flowers*, 101 N. C. 158, 7 S. E. Rep. 680; *McIlvaine v. Kadel*, 30 How. Pr. 193; *Temple v. Hawley*, 1 Sandf. Ch. 153. See, however, *Goodnow v. Empire Lumber Co.* 31 Minn. 468, 18 N. W. Rep. 283, 47 Am. Rep. 798. Of course, a statute removing all the disabilities of coverture, the rule of the text does not apply, as in *Mississippi*: *Brantley v. Wolf*, 60 Miss. 420. In *Indiana* the statute, R. S. 1881, § 1285, which removes the disability of coverture on the avoidance of deeds by infants, does not apply where an infant wife has joined with her husband in a conveyance of his land, so as to render necessary a disaffirmance by her within a reasonable time after attaining majority, since her only interest in the land is inchoate, and no right of action accrues either to her to enforce her interest, or to the grantee to quiet his title, till the death of her husband. *McClanahan v. Williams* (Ind.), 35 N. E. Rep. 897.

<sup>1</sup> *Zouch v. Parsons*, 3 Burr. 1794; *Sims v. Everhardt*, 102 U. S. 300, 313, per

*Strong, J.*; *Chandler v. Simmons*, 97 Mass. 508, 512, 93 Am. Dec. 117; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Shipley v. Bunn* (Mo.), 28 S. W. Rep. 754; *Cummings v. Powell*, 8 Tex. 80; *Kilgore v. Jordan*, 17 Tex. 341; *Welch v. Bunce*, 83 Ind. 382; *Chapman v. Chapman*, 13 Ind. 396; *McCormic v. Leggett*, 8 Jones, 425; *Singer Manuf. Co. v. Lamb*, 81 Mo. 221; *Armitage v. Widor*, 36 Mich. 124; *Emmons v. Murray*, 16 N. H. 385; *Shipman v. Horton*, 17 Conn. 481, 483, per *Williams, C. J.*; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Hastings v. Dollarhide*, 24 Cal. 195. But now, in *California*, Civ. Code, § 35, a minor may disaffirm his contract before his majority, or within a reasonable time afterwards. There is a similar statute in *Dakota*, Comp. Laws, 1887, § 2516. A decision not in harmony with others is *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409.

<sup>2</sup> *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Cummings v. Powell*, 8 Tex. 80. No case has been cited in which an infant has by himself or his guardian attempted, while under age, to recover lands which have been passed from him by an executed conveyance; and it is probable that no such case can be shown. Per *Kemphill, C. J.*

<sup>3</sup> *Irvine v. Irvine*, 5 Minn. 61; *Kilgore v. Jordan*, 17 Tex. 341.

cannot avoid it by making an attachment of the land after the minor has come of age.<sup>1</sup> An assignee in insolvency cannot disaffirm a deed or mortgage made by the insolvent while under age, and not affirmed or disaffirmed by him after attaining his majority. "The ground upon which an infant is allowed to void his contract is for his personal benefit, and for protection against the improvidence which is the consequence of his youth. He may therefore avoid his contract without returning the consideration received, but it is not easy to see why his creditors, or the assignee as representing them, should have this right. It may well be that the estate of the insolvent has been augmented to that extent by the very sum of money which the minor received. The fact that the infant may rescind without returning the consideration indicates that the right is strictly a personal privilege, and that, as the rule permitting him to avoid his contract is established solely for his protection, so he alone can have the benefit of it."<sup>2</sup>

12. A guardian of a minor cannot maintain a suit to avoid a conveyance by his ward, for the guardian has no title to the property, but is merely an agent or attorney.<sup>3</sup> The ward must be made a party to any suit which concerns his title to property.

<sup>1</sup> *Baldwin v. Rosier*, 1 McCrary, 384.

*Alabama*: *Sharp v. Robertson*, 76 Ala. 343. *Arkansas*: *Bozeman v. Browning*, 31 Ark. 364. *California*: *Hastings v. Dollarhide*, 24 Cal. 195. *Georgia*: Code 1882, § 2732. *Massachusetts*: *Kendall v. Lawrence*, 22 Pick. 540; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134; *McCarty v. Murray*, 3 Gray, 578; *Kingman v. Perkins*, 105 Mass. 111. *Michigan*: *Dunton v. Brown*, 31 Mich. 182. *Missouri*: *Singer Manuf. Co. v. Lamb*, 81 Mo. 221. *New Hampshire*: *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38. *New York*: *Hartness v. Thompson*, 5 Johns. 160; *Beardsley v. Hotchkiss*, 96 N. Y. 201. *North Carolina*: *Hoyle v. Stowe*, 2 Dev. & B. 320, 323. *South Carolina*: *Lester v. Frazer*, 2 Hill Eq. 528. *Texas*: *Harris v. Musgrove*, 59 Tex. 401.

A trustee under a marriage settlement cannot refuse to render an account on the ground that the parties to it are infants, neither of them having disaffirmed it. *Jones v. Butler*, 30 Barb. 641.

<sup>2</sup> *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. Rep. 773, per Devens, J.

<sup>3</sup> *Lombard v. Morse*, 155 Mass. 136, 29 N. E. Rep. 205. *Barker, J.*, says: "The precedents favoring such an exception are found in England and in New York, where committees are appointed for persons of unsound mind, and are founded in part upon the doctrine that the committee acquires some right in the ward's estate, and in part upon the ancient theory that no man can be heard to stultify himself. 1 *Daniell Ch. Pr.* 9, 83, 1 *Story Eq. Pl.* 64, 65; *Ortley v. Messere*, 7 Johns. Ch. 139; *Gorham v. Gorham*, 3 Barb. Ch. 24. We have seen that here the guardian has no title or interest in the ward's estate. Both in England and New York the lunatic may be joined with his committee; the rule against self-stultification being held inapplicable to acts done to the prejudice of one's self. *Ridler v. Ridler*, 1 Eq. Cas. Abr. 275, pl. 5; *Gorham v. Gorham*, *ubi supra*." And see *Lang v. Whidden*, 2 N. H. 435.

Neither the infant nor his guardian can determine during the continuance of infancy whether the deed shall be affirmed or disaffirmed. This is a matter for the grantor's decision after he arrives at mature age.<sup>1</sup> But if the guardianship, by reason of any disability for which an adult might be placed under guardianship, continues after the ward has become of age, the guardian may avoid any conveyance executed by the ward while under age which might be avoided by the ward himself if capable of exercising the right.<sup>2</sup>

13. The heirs of an infant grantor may avoid his deed in the same manner and within the same time that such grantor himself might if living.<sup>3</sup> Privies in blood may take advantage of the disability of infancy, though privies in estate cannot.<sup>4</sup> But a purchaser or devisee holding his right from the infant, derived from him after he has reached full age, may avoid a prior deed of the same land made by the infant during his disability.<sup>5</sup>

#### V. *What amounts to an Affirmance.*

14. An infant on coming of age affirms his deed by any act whereby he recognizes the instrument as being in force according to its purport.<sup>6</sup> Thus, if, having made a mortgage while a

<sup>1</sup> *Dunton v. Brown*, 31 Mich. 182.

<sup>2</sup> *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117.

<sup>3</sup> *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 63; *Veal v. Fortson*, 57 Tex. 482; *Bozeman v. Browning*, 31 Ark. 364; *Harvey v. Briggs*, 68 Miss. 60, 8 So. Rep. 274; *Singer Manuf. Co. v. Lamb*, 81 Mo. 221; *Parsons v. Hill*, 8 Mo. 135; *Sharp v. Robertson*, 76 Ala. 343.

<sup>4</sup> *Whittingham's Case*, 8 Coke, 42 b; *Austin v. Charlestown Female Seminary*, 8 Met. 196, 203, 41 Am. Dec. 497; *Bozeman v. Browning*, 31 Ark. 364, 375; *Hoyle v. Stowe*, 2 Dev. & B. 320, 322.

<sup>5</sup> *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 251, 19 Am. Dec. 71; *Shrock v. Crowl*, 83 Ind. 243; *Price v. Jennings*, 62 Ind. 111; *Pitcher v. Laycock*, 7 Ind. 398; *Jackson v. Carpenter*, 11 Johns. 539; *Hoyle v. Stowe*, 2 Dev. & B. 320, 323.

<sup>6</sup> *Irvine v. Irvine*, 9 Wall. 617; *Mid-*

*dleton v. Hoge*, 5 Bush, 478; *Allen v. Poole*, 54 Miss. 323; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Hoyle v. Stowe*, 2 Dev. & B. 320; *Wheaton v. East*, 5 Yerg. 41, 26 Am. Dec. 251.

In *Irvine v. Irvine*, 9 Wall. 617, 627, Mr. Justice Strong, referring to the distinction between the nature of those acts which are necessary to avoid an infant's deed and the character of those acts that are sufficient to confirm it (acts which would not be sufficient to avoid a deed being sufficient to affirm it), said: "There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passes the title of the land to his grantee. Now, if the deed be avoided, the ownership of the land is retransferred. The seisin is changed. . . . On the other hand, a confirmation passes no title; it effects no change of property; it disturbs no seisin.

minor, after coming of age he conveys the land subject to the mortgage, he thereby confirms the mortgage;<sup>1</sup> and he confirms it also by a part payment of such mortgage or of interest due upon it;<sup>2</sup> or by procuring releases of portions of the land mortgaged.<sup>3</sup> A will made by one after coming of age, wherein he directs the payment of a debt secured by a mortgage, would doubtless be taken as a sufficient confirmation of a mortgage made by the testator during his infancy to secure the payment of such debt. But a general direction for the payment of "all his just debts" might not be sufficient.<sup>4</sup> If, after coming of age, the grantor expresses satisfaction with the sale and receives a part of the consideration money, this is a sufficient ratification of the deed.<sup>5</sup> But a mere recognition of the fact that the grantor had made a conveyance is not of itself proof of a confirmation of such conveyance.<sup>6</sup> In a deed of a part of a tract of land made in pursuance of an arrangement to convey all of it, a reference to a prior conveyance by the grantor, made while a minor, amounts to a confirmation of such prior conveyance.<sup>7</sup>

Where an infant, having made a conveyance of land, upon arriving at full age joins with his grantee in executing a mortgage of the land to secure a debt of the grantee, he affirms his deed of conveyance.<sup>8</sup> A mortgagor, after attaining his majority, by accepting part of the proceeds of a foreclosure sale ratifies the mortgage.<sup>9</sup> If a mortgagor after coming of age accepts a reconveyance of the mortgaged land, and makes a fresh mortgage to the same mortgagee to secure the original debt and an additional loan, this is not merely a ratification of the mortgage made during his minority, but is a new contract upon a good consideration.<sup>10</sup>

It is, therefore, itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner."

<sup>1</sup> *Story v. Johnson*, 2 Y. & C. Ex. 586; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Scott v. Buchanan*, 11 Humph. 468; *Pulmer v. Miller*, 25 Barb. 399; *Lynde v. Bidd*, 2 Paige, 191, 21 Am. Dec. 84; *Allen v. Poole*, 54 Miss. 323; *Losey v. Bond*, 94 Ind. 67; *Phillips v. Green*, 5 Mon. 344, 355; *Ward v. Anderson*, 111 N. C. 115, 15 S. E. Rep. 933; *American Mortg. Co. v. Wright (Ala.)*, 14 So. Rep. 399.

<sup>2</sup> *Keegan v. Cox*, 116 Mass. 289.

<sup>3</sup> *Wilson v. Darragh*, 28 N. Y. St. Rep. 390, 7 N. Y. Supp. 810.

<sup>4</sup> *Merchants' F. Ins. Co. v. Grant*, 2 Edw. Ch. 544; *Smith v. Mayo*, 9 Mass. 62, 6 Am. Dec. 28.

<sup>5</sup> *Ferguson v. Bell*, 17 Mo. 347.

<sup>6</sup> *Tucker v. Moreland*, 10 Pet. 58.

<sup>7</sup> *Phillips v. Green*, 5 Mon. 344.

<sup>8</sup> *Watkins v. Wassell*, 15 Ark. 73.

<sup>9</sup> *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. Rep. 542.

<sup>10</sup> *In re Foulkes*, 3 Reports (1893), 682, 69 L. T. 183.



A minor's conveyance to his sister, without a valuable consideration, is confirmed, after he becomes of age, by his acting as his sister's agent in selling portions of the land, receiving commissions therefor, proclaiming title in her to purchasers, recognizing the land as hers in making settlements with her, making no objections to her conveyances, and failing to assert any right for a long period after attaining his majority.<sup>1</sup> A minor's lease is ratified by his receiving, after becoming of age, the rent falling due under it.<sup>2</sup> But such act will not amount to a ratification unless it is done with a knowledge of the instrument to be affected.<sup>3</sup>

The voidable deed of an infant is not ratified by mere words; but any deliberate act done by him after coming of age, by which he takes benefit under a deed made while he was under age, or by which he expressly recognizes its validity, is a ratification of such deed. Thus, if he receives the whole or a part of the purchase-money due him under such deed, he ratifies the deed. He ratifies it by accepting a reconveyance from his grantee of a part of the land.<sup>4</sup>

15. A re-acknowledgment or redelivery of the deed after the grantor has become of full age is a ratification of it which relates back, in effect, to the original delivery. If the conveyance so ratified is a mortgage the ratification will cut off a voluntary conveyance by the mortgagor in trust for his wife and children, executed after the making of the mortgage and before the ratification, for the purchaser under such voluntary deed is not a *bona fide* purchaser for value.<sup>5</sup>

If a deed, signed and acknowledged by a person during his minority, be delivered by him, or by his agent with his consent, after he becomes an adult, the deed cannot be avoided on account of infancy, for the deed does not take effect till the time of its delivery; and in such case there is no disability when the deed takes effect.<sup>6</sup>

A minor's deed is not ratified by his offering, after coming of age, to make a deed of ratification upon some contingency, such

<sup>1</sup> *Houston v. Houston* (Tex.), 18 S. W. Rep. 688.

<sup>2</sup> *Ashfield v. Ashfield*, W. Jones, 157; *Myers v. Coal Co.* 126 Pa. St. 582, 17 Atl. Rep. 891.

<sup>3</sup> *Zoebisich v. Rauch*, 133 Pa. St. 532, 19 Atl. Rep. 415.

<sup>4</sup> *McCormic v. Leggett*, 8 Jones, 425; *Ferguson v. Bell*, 17 Mo. 347.

<sup>5</sup> *Palmer v. Miller*, 25 Barb. 399; *Davidson v. Young*, 38 Ill. 145; *Murray v. Shanklin*, 4 Dev. & B. 289.

<sup>6</sup> *Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99.

as a condition that the unpaid purchase-money is paid or secured to him.<sup>1</sup>

If an infant, on coming of age, repudiates his deed, he cannot of course recover the purchase-money then remaining unpaid.<sup>2</sup>

16. It is not essential to a ratification that it should have been made with knowledge that the grantor had a legal right to repudiate the deed,<sup>3</sup> though there are many cases, particularly among the earlier ones, in which it is declared that his ratification must be with full knowledge of his legal rights.<sup>4</sup> There would at least seem to be a presumption that a person who has attained his majority is aware of his rights in regard to contracts made by him during his minority.<sup>5</sup>

#### VI. *What amounts to a Disaffirmance.*

17. One may disaffirm a deed made during infancy by any act done after coming of age which is inconsistent with such

<sup>1</sup> Craig v. Van Bebber, 100 Mo. 584, 13 S. W. Rep. 906; Clamorgan v. Lane, 9 Mo. 442.

<sup>2</sup> Craig v. Van Bebber, 100 Mo. 584, 13 S. W. Rep. 906.

<sup>3</sup> Morse v. Wheeler, 4 Allen, 570; American Mortg. Co. v. Wright (Ala.), 14 So. Rep. 399; Anderson v. Soward, 40 Ohio St. 325, 48 Am. Rep. 687; Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774, disapproving dictum to contrary in Fetrow v. Wiseman, 40 Ind. 148; Ring v. Jamison, 66 Mo. 424, 2 Mo. App. 584; Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574.

<sup>4</sup> The notion, that the ratification must have been made with knowledge that the grantor was not bound by his deed made while he was a minor, is declared by Metcalf, J., in Morse v. Wheeler, 4 Allen, 570, to have had its origin in a dictum of Lord Alvanley in Harmer v. Killing, 5 Esp. 102. "Yet we have found," continues Judge Metcalf, "no case in the English reports in which the question has been raised, whether it is necessary to the ratification of such contract that the new promise should be made with knowledge that the party was not legally liable on his original contract. And we find only

one instance in which an English judge is reported to have expressed an opinion that such knowledge is necessary. Mawson v. Blane, 10 Exch. 212, 26 Eng. L. & Eq. 560. Still there are cases in the state courts in which judges have cited, with apparent approval, the position advanced by Lord Alvanley. In other cases judges have advanced the same position without referring to any authority. Smith v. Mayo, 9 Mass. 64; Ford v. Phillips, 1 Pick. 203; Thing v. Libbey, 16 Me. 57; Curtin v. Patton, 11 S. & R. 311; Reed v. Boshears, 4 Sneed, 118; Norris v. Vance, 3 Rich. 168. In no one of these cases was a decision of that point necessary, and they were all decided on other grounds."

There are, however, some decisions and more dicta following Lord Alvanley's dictum. See Hinely v. Margaritz, 3 Pa. St. 428; Zoebbish v. Rauch, 133 Pa. St. 532, 19 Atl. Rep. 415; Turner v. Gaither, 83 N. C. 357; Baker v. Kennett, 54 Mo. 82; Davidson v. Young, 38 Ill. 145; Eureka Co. v. Edwards, 71 Ala. 248, 255, 46 Am. Rep. 314, per Stone, J.; Flexner v. Dickerson, 72 Ala. 318, 323; Wilson v. Md. L. Ins. Co. 60 Md. 150.

<sup>5</sup> Hatch v. Hatch, 60 Vt. 172, 13 Atl. Rep. 791; Taft v. Sergeant, 18 Barb. 320.

deed, so that the two cannot properly stand together.<sup>1</sup> Disaffirmance must be a matter both of act and intention. No particular act is necessary, and the intention need not be expressed in any particular manner or form. The ancient doctrine that the disaffirmance should be of as high and solemn a character as the act disaffirmed has no place in modern law.<sup>2</sup> Any act unequivocally manifesting an intention to disaffirm the deed is sufficient.<sup>3</sup> "In respect to the avoidance of deeds made by infants, the current of modern decisions is to a liberal extension of the rule; and the tendency is to establish one simpler, more conservative, and of easier and more general application, thereby avoiding many of the perplexing and refined distinctions under the strict rule which required the act of disaffirmance to be of equal notoriety and solemnity with the original act or conveyance, but which was never of universal application, for the deed could always be avoided by a proper plea."<sup>4</sup> A suit to recover the purchase-money is an act of avoidance. A notice or letter to the grantor requesting the return of the purchase-money, with an intention to repudiate the purchase, is sufficient though the notice or letter be not followed by a suit for the purchase-money. An offer to reconvey is not essential to a complete disaffirmance. After such notice the purchaser cannot abandon the rescission and affirm the purchase. Though such rescission does not of itself re-transfer the legal title to the grantor, so as to enable him to recover the land by ejectment, he may maintain an equitable action for the cancellation of the deed to the grantee.<sup>5</sup>

18. A minor's deed is disaffirmed by his bringing a suit in equity to cancel it or set it aside on the ground of his disability;<sup>6</sup>

<sup>1</sup> *Eureka Co. v. Edwards*, 71 Ala. 248; *J. See, also, McCarthy v. Nicrosi*, 72 Illinois Land Co. v. Beem, 2 Ill. App. Ala. 332, 47 Am. Rep. 418.

390; *Bagley v. Fletcher*, 44 Ark. 153; <sup>5</sup> *McCarty v. Woodstock Iron Co.* 92 Ala. 463, 8 So. Rep. 417.

*Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Long v. Williams*, 74 Ind. 115; *Law v. Long*, 41 Ind. 586; *Allen v. Poole*, 54 Miss. 323; *Singer Manuf. Co. v. Lamb*, 81 Mo. 221.

<sup>2</sup> *Singer Manuf. Co. v. Lamb*, 81 Mo. 221, 225, per Martin, C.; *Allen v. Poole*, 54 Miss. 323.

<sup>3</sup> *Bagley v. Fletcher*, 44 Ark. 153; *Tunison v. Chamblin*, 88 Ill. 378.

<sup>4</sup> *McCarty v. Woodstock Iron Co.* 92 Ala. 463, 8 So. Rep. 417, 418, per Clopton,

<sup>6</sup> *Sims v. Everhardt*, 102 U. S. 300; *Schaffer v. Lavretta*, 57 Ala. 14; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Tunison v. Chamblin*, 88 Ill. 378; *Baker v. Kennett*, 54 Mo. 82; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. Rep. 852; *Bedinger v. Wharton*, 27 Gratt. 857; *Gillespie v. Bailey*, 12 W. Va. 70, 89, 29 Am. Rep. 445.

or by his bringing a writ of entry, ejectment, or other action to recover possession of the land.<sup>1</sup>

19. Notice by the grantor after coming of age, that he disaffirms his deed made during infancy, is a sufficient act of avoidance.<sup>2</sup> But no notice of disaffirmance is necessary before bringing a suit for the recovery of the property, or for the avoidance of the deed.<sup>3</sup>

20. A reentry is an act showing an intention to disaffirm the deed. Where a valid conveyance cannot be made of land held adversely to the grantor at the time, before making a conveyance which will disaffirm a deed made during minority, the grantor must first make an entry upon the land.<sup>4</sup> But generally, however, a valid conveyance can be made of land in the adverse possession of another.<sup>5</sup>

21. A deed of an infant may be avoided by his absolute sale after he is of age, and conveyance of the same land to a third person.<sup>6</sup> The effect of such subsequent deed as a disaffirm-

<sup>1</sup> *Cole v. Pennoyer*, 14 Ill. 158; *Webb v. Hall*, 35 Me. 336; *Chadbourn v. Rackliff*, 30 Me. 354; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. Rep. 539; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569; *Harris v. Ross*, 86 Mo. 89, 56 Am. Rep. 411; *Clark v. Tate*, 7 Mont. 171, 14 Pac. Rep. 761; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

<sup>2</sup> *McCarthy v. Necrosi*, 72 Ala. 332; *McCarthy v. Woodstock Iron Co.* 92 Ala. 463, 8 So. Rep. 417; *Long v. Williams*, 74 Ind. 115, 119, per Niblack, J.; *Scranton v. Stewart*, 52 Ind. 68, 92. And see *Tunison v. Chamblin*, 88 Ill. 378.

<sup>3</sup> *Clark v. Tate*, 7 Mont. 171, 14 Pac. Rep. 761.

<sup>4</sup> *Tucker v. Moreland*, 10 Pet. 58; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Riggs v. Fisk*, 64 Ind. 100; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Jackson v. Carpenter*, 11 Johns. 539; *Dominick v. Michael*, 4 Sandf. 374, 421; *Murray v. Shanklin*, 4 Dev. & B. 289; *Harris v. Cannon*, 6 Ga. 382.

<sup>5</sup> *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. Rep. 539. "The old common-law doctrine of feoffment with livery of seisin

does not constitute any part of our law of conveyancing. Our registry laws supply their place, and furnish the notoriety of transfer intended to be given by that ancient mode of passing title, and the making and recording of the second deed in this case was entirely sufficient." Per Sherwood, J. *Chadbourn v. Rackliff*, 30 Me. 354, 361; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 124; *Cresinger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565; *Allen v. Poole*, 54 Miss. 323, 331; *Norcum v. Sheahan*, 21 Mo. 25, 64 Am. Dec. 214; *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233, with notice; *White v. Flora*, 2 Overt. 426, 431; *Pitcher v. Laycock*, 7 Ind. 398; *Hoyle v. Stowe*, 2 Dev. & B. 320. Georgia: Code 1882, §§ 2694, 2695.

<sup>6</sup> *Frost v. Wolverton*, 1 Strange, 94; *Tucker v. Moreland*, 10 Pet. 58; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Jackson v. Burchin*, 14 Johns. 124; *Jackson v. Carpenter*, 11 Johns. 539; *Chapin v. Shafer*, 49 N. Y. 407; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *State v. Plaisted*, 43 N. H. 413; *Riggs v. Fisk*, 64 Ind. 100;

ance is a question for the court, and should not be submitted to the jury.<sup>1</sup> The subsequent conveyance is not a disaffirmance of the infant's deed unless it is so inconsistent therewith that both deeds cannot properly stand together.<sup>2</sup> If the subsequent conveyance be to one who has become interested in the property under the earlier conveyance, the subsequent deed will operate as a confirmation of the voidable deed, and not as a disaffirmance of it.<sup>3</sup>

**22. A mortgage made during minority is not disaffirmed by a quitclaim deed made by the mortgagor after attaining majority, as the two instruments are consistent with each other and can stand together, for such deed only purports to convey the estate remaining in the grantor at the time of its execution.<sup>4</sup> For the same reason, a subsequent mortgage does not necessarily avoid a prior one made during minority. The two mortgages can stand together.<sup>5</sup> But such prior mortgage is disaffirmed by the mortgagor's making, after coming of age, an absolute conveyance of the same land to another with covenants of warranty; for such a deed is inconsistent with the prior mortgage.<sup>6</sup>**

**23. The grantor on coming of age may avoid his deed as against a bona fide purchaser for value from his vendee, as well as against the vendor himself. He may demand and recover**

*Hastings v. Dollarhide*, 24 Cal. 195; *Bagley v. Fletcher*, 44 Ark. 153, 17 S. W. Rep. 372; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372, 26 Am. St. Rep. 837; *McGan v. Marshall*, 7 Humph. 121; *White v. Flora*, 2 Overt. 426; *Vallandigham v. Johnson*, 85 Ky. 288; *Haynes v. Bennett*, 53 Mich. 15; *Prout v. Wiley*, 28 Mich. 164; *Corbett v. Spencer*, 63 Mich. 731, 18 N. W. Rep. 539; *Dixon v. Merritt*, 21 Minn. 196; *Dawson v. Helms*, 30 Minn. 107, 14 N. W. Rep. 462; *Black v. Hills*, 36 Ill. 376, 87 Am. Dec. 224; *Cresinger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565; *Pitcher v. Laycock*, 7 Ind. 398; *Losey v. Bond*, 94 Ind. 67; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. Rep. 906; *Singer Manuf. Co. v. Lamb*, 81 Mo. 221; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Hoyle v. Stowe*, 2 Dev. & B. 320; *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209. Georgia: Code 1882, § 2694;

*Harris v. Cannon*, 6 Ga. 382; *Wimberly v. Jones*, 1 Ga. Dec. 91.

<sup>1</sup> *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441.

<sup>2</sup> *Singer Manuf. Co. v. Lamb*, 81 Mo. 221; *Palmer v. Miller*, 25 Barb. 399; *Phillips v. Green*, 3 A. K. Marsh. 7, 13 Am. Dec. 124; *Stuart v. Baker*, 17 Tex. 417, 421.

<sup>3</sup> *Eagle Fire Co. v. Lent*, 6 Paige, 635, 1 Edw. Ch. 301; *Watkins v. Wassell*, 15 Ark. 73; *Bagley v. Fletcher*, 44 Ark. 153, 157.

<sup>4</sup> *Singer Manuf. Co. v. Lamb*, 81 Mo. 221. In *Bagley v. Fletcher*, 44 Ark. 153, a quitclaim deed was held to be a disaffirmance, *Eakin, J.*, dissenting.

<sup>5</sup> *McGan v. Marshall*, 7 Humph. 121; *Bagley v. Fletcher*, 44 Ark. 153, 157; *Singer Manuf. Co. v. Lamb*, 81 Mo. 221, 226; *Buchanan v. Griggs*, 18 Neb. 121.

<sup>6</sup> *Dixon v. Merritt*, 21 Minn. 196; *Allen v. Poole*, 54 Miss. 323.

the property from the person in possession, whoever he may be.<sup>1</sup> Were the rule otherwise, and the infant's grantee could make the deed valid by a mere sale to an innocent purchaser, this would practically destroy a rule established to protect minors against the consequences of improvident conveyances of their property.<sup>2</sup> The fact that a purchaser from one who is disaffirming his deed made while under age had notice of such prior deed does not make him a fraudulent purchaser.<sup>3</sup>

If an infant, after attaining his majority, ratifies a conveyance made by him during his minority by an instrument not of record, or by acts *in pais*, and then conveys the same land for a valuable consideration to a person having notice of the deed made during the minority of the grantor, but without notice of the ratification, such subsequent purchaser acquires the better title.<sup>4</sup>

#### VII. *Affirmance from Lapse of Time.*

24. The grantor's affirmance of his deed is not to be presumed merely from his silent acquiescence, unless this be continued for a time which would be a bar to an action of ejectment.<sup>5</sup>

<sup>1</sup> Price v. Furman, 27 Vt. 268, 270, per Isham, J.; Hovey v. Hobson, 53 Me. 451, 458, per Appleton, J.; Jenkins v. Jenkins, 12 Iowa, 195; Buchanan v. Hubbard, 96 Ind. 1; Sims v. Smith, 86 Ind. 577; Miles v. Lingerian, 24 Ind. 385; Mustard v. Wohlford, 15 Gratt. 329, 76 Am. Dec. 209; McMorris v. Webb, 17 S. C. 558, 43 Am. Rep. 629; Vallandigham v. Johnson, 85 Ky. 288, 3 S. W. Rep. 173; Brantley v. Wolf, 60 Miss. 420.

<sup>2</sup> Searcy v. Hunter, 81 Tex. 644, 17 S. W. Rep. 372, 26 Am. St. Rep. 837; Hieatt v. Dixon (Tex. Civ. App.), 26 S. W. Rep. 263.

<sup>3</sup> Mustard v. Wohlford, 15 Gratt. 329, 76 Am. Dec. 209; Jackson v. Burchin, 14 Johns. 124; Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224. In the latter case, Lawrence, J., said: "Yet the right would be practically of little value to the minor if the person buying of him, after he becomes of age, is to be considered as incurring in any way the censure of the law, and to be therefore denied the position of an innocent purchaser. It does not de-

volve upon him to investigate whether, in the particular case, his grantor ought to disaffirm, as a question of morals between him and the first grantee."

<sup>4</sup> Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224.

<sup>5</sup> Irvine v. Irvine, 9 Wall. 617, 626; Tucker v. Moreland, 10 Pet. 58; Sims v. Everhardt, 102 U. S. 300, 312, per Strong, J., who said: "We think the preponderance of authority is that, in deeds executed by infants, mere inertness or silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed." Ware v. Brush, 1 McLean, 533; Wells v. Seixas, 24 Fed. Rep. 82. Alabama: Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418. See Schaffer v. Lavretta, 57 Ala. 14. Arkansas: Vaughan v. Parr, 20 Ark. 600; Kountz v. Davis, 34 Ark. 590; Stull v. Harris, 51 Ark. 294, 11 S. W. Rep. 104. Indi-

"The reason is, that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him, as a duty towards others, to act speedily. Language appropriate in other cases, requiring him to act within a reasonable time, would become inappropriate here. He may therefore, after years of acquiescence, by an entry or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy."<sup>1</sup> Even the lapse of a longer period of time than would bar the recovery of the land does not amount to an acquiescence if the purchaser during this whole period has not been in possession.<sup>2</sup> Nor will the lapse of a long period imply a ratification when there has been an express refusal to ratify.<sup>3</sup>

25. But acquiescence in connection with other circumstances will amount to an affirmation.<sup>4</sup> Thus if the grantor,

ana: *Sims v. Bardoner*, 86 Ind. 87, 95, 44 Am. Rep. 263; *Stringer v. Northwestern Mut. L. Ins. Co.* 82 Ind. 100; *Moore v. Abernathy*, 7 Blackf. 442. **Kentucky**: *Hofert v. Miller*, 86 Ky. 572, 6 S. W. Rep. 447. **Maine**: *Boody v. McKenney*, 23 Me. 517; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Chadbourn v. Rackliff*, 30 Me. 354. See, however, *Robinson v. Weeks*, 56 Me. 102. **Michigan**: *Prout v. Wiley*, 28 Mich. 164; *Tyler v. Gallop*, 68 Mich. 185, 35 N. W. Rep. 902; *Rundle v. Spencer*, 67 Mich. 189; *Donovan v. Ward* (Mich.), 59 N. W. Rep. 254. **Missouri**: *Huth v. Carondelet Marine Ry. Co.* 56 Mo. 202; *Baker v. Kennett*, 54 Mo. 82; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Thomas v. Pullis*, 56 Mo. 211; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206. **New York**: *Jackson v. Carpenter*, 11 Johns. 539, 541; *Voorhies v. Voorhies*, 24 Barb. 150; *McMurray v. McMurray*, 66 N. Y. 175; *Green v. Green*, 7 Hun. 492, 69 N. Y. 553, 25 Am. Rep. 233. See *Aldrich v. Funk*, 48 Hun. 367, 1 N. Y. Supp. 541. See, however, *Jones v. Butler*, 30 Barb. 641. **Ohio**: *Drake v. Ramsay*, 5 Ohio, 252; *Cresinger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565. **Pennsylvania**: *Urban v. Grimes*, 2 Grant, 96; *Lenhart v. Ream*, 74 Pa. St. 59, recognizing

the first-named case. See, however, *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. Rep. 114. **Virginia**: *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 371; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381. **West Virginia**: *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

<sup>1</sup> *Boody v. McKenney*, 23 Me. 517, 524.

<sup>2</sup> *Gillespie v. Bailey*, 12 W. Va. 70, 91; 29 Am. Rep. 445. In this case 27 years had elapsed, after the grantor had attained his majority, before he sought to avoid the sale. Green, C. J., delivering judgment, carefully said: "I do not mean to say that mere lapse of time, though the purchaser was not in continuous possession, when extended far beyond the time in which lands can be recovered when in adverse possession, might not under some circumstances amount to a confirmation, but simply that such acquiescence for a short time beyond the period, when there was no possession held by the purchaser, cannot be held to be an affirmation of the sale."

<sup>3</sup> *Behm v. Molly*, 133 Pa. St. 614, 19 Atl. Rep. 421, 562.

<sup>4</sup> *Irvine v. Irvine*, 9 Wall. 617; *Cresinger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565; *Drake v. Ramsay*, 5 Ohio, 252; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206; *Thomas v. Pullis*, 56 Mo. 211; *Dolph v.*

after coming of age, for a long time without objection stands by and sees the purchaser making valuable improvements upon the lands, he will not be allowed to disaffirm the sale.<sup>1</sup> He must act promptly to preserve his right of disaffirmance. But he is not required to act while he is a minor. Until he becomes of age his standing by while the purchaser is making improvements, and giving no notice of his intention to disaffirm upon attaining his majority, does not estop him from then disaffirming.<sup>2</sup>

26. The lapse of time may frequently furnish evidence of acquiescence, and thus confirm the title of the purchaser;<sup>3</sup> but of itself it does not take away the right to avoid the deed until the statute of limitations has run. It is really the circumstances showing the grantor's acquiescence in the conveyance, and not the mere lapse of time, that cuts off his right to disaffirm his deed. "There is no reason in principle for saying that the right to disaffirm a deed on account of infancy shall be cut off by lapse of time, short of the period prescribed in the statute of limitations for bringing an action to recover the property, unless it be on the principle of estoppel; and it must be an exception to the ordinary rule if there can be an estoppel where there has been no change in the position of the parties, in respect to the matter in dispute, detrimental to the one who pleads the estoppel."<sup>4</sup> The statute of

Hand, 156 Pa. St. 91, 27 Atl. Rep. 114; Logan v. Gardner, 136 Pa. St. 588, 20 Am. St. Rep. 939; Woods v. Wilson, 37 Pa. St. 379.

<sup>1</sup> Sims v. Bardoner, 86 Ind. 87, 95, 44 Am. Rep. 263, per Morris, J.; Stringer v. Northwestern Mut. L. Ins. Co. 82 Ind. 100; Hartman v. Kendall, 4 Ind. 403; Brantley v. Wolf, 60 Miss. 420; Wallace v. Latham, 52 Miss. 291; Allen v. Poole, 54 Miss. 323 330; Wheaton v. East, 5 Yerg. 41; Birch v. Linton, 78 Va. 584, 49 Am. Rep. 381; Wallace v. Lewis, 4 Harr. 75; Jones v. Phoenix Bank, 8 N. Y. 228, 235; Bostwick v. Atkins, 3 N. Y. 53; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Lacy v. Pixler, 120 Mo. 383, 25 S. W. Rep. 206.

<sup>2</sup> Buchanan v. Hubbard, 96 Ind. 1; Richardson v. Pate, 93 Ind. 423; Brantley v. Wolf, 60 Miss. 420; Davidson v. Young, 38 Ill. 145.

<sup>3</sup> Irvine v. Irvine, 9 Wall. 617; Drake v. Ramsay, 5 Ohio, 252; Cresinger v. Welch, 15 Ohio, 156, 193, 45 Am. Dec. 565; Trader v. Jarvis, 23 W. Va. 100.

<sup>4</sup> Stringer v. Northwestern Mut. L. Ins. Co. 82 Ind. 100, 107, per Woods, J. To like effect the same court in Sims v. Bardoner, 86 Ind. 87, 95, 44 Am. Rep. 263, said: "But if the party entitled to disaffirm does not stand by, if he does nothing in affirmance of the deed, and is not called upon by peculiar circumstances to assert his rights, he may disaffirm at any time before his right of entry is barred." These opinions are quoted with approval in Richardson v. Pate, 93 Ind. 423, 47 Am. Rep. 374: "It would be contrary to the benign principles of the law, by which the imbecility and indiscretion of infants are protected from injury to their property, that a mere acquiescence, without any intermediate or con-



limitations is the proper guide as reasonable time for disaffirmance, except in cases where the grantor after coming of age does something totally inconsistent with an intention to disaffirm.<sup>1</sup>

If the grantor since his majority has done no affirmative act to ratify his deed, has remained constantly at a distance from the land, and is not shown to have known of subsequent conveyances, he may disaffirm at any time within the period of limitation.<sup>2</sup>

#### VIII. *Disaffirmance within a reasonable Time.*

27. On the other hand, in many cases it has been said that the disaffirmance must be within a reasonable time after the infant has attained his majority;<sup>3</sup> and in some States there are

tinued benefit showing his assent, should operate as an extinguishment of his title." *Jackson v. Carpenter*, 11 Johns. 539, 543, per Yates, J.

<sup>1</sup> *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Huth v. Carondelet Marine Ry. & Dock Co.* 56 Mo. 202; *Thomas v. Pullis*, 56 Mo. 211; *Sims v. Everhardt*, 102 U. S. 300; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206.

<sup>2</sup> *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206.

<sup>3</sup> *Holmes v. Blogg*, 8 Taunt. 35, 1 Moore, 466, a dictum, and not a case of an infant's deed; *Dublin, &c. Ry. Co. v. Black*, 8 Exch. 181, not a case of a deed. *California*: *Hastings v. Dollarhide*, 24 Cal. 195. *Connecticut*: *Kline v. Beebe*, 6 Conn. 494, where thirteen years' delay was held to be unreasonable delay. *Georgia*: *Nathans v. Arkwright*, 66 Ga. 179. It must be within seven years, under a statute of this State. *Illinois*: *Illinois Land Loan Co. v. Bonner*, 75 Ill. 315; *Black v. Hills*, 36 Ill. 376; *Blankenship v. Stout*, 25 Ill. 132. *Maryland*: *Amey v. Cockey*, 73 Md. 297, 20 Atl. Rep. 1071, where a married woman delayed five years after her disability of coverture was removed, and forty years after the execution of her deed. *Minnesota*: *Goodnow v. Empire Lumber Co.* 31 Minn. 468, 18 N. W. Rep. 283, 47 Am. Rep. 798. *Mississippi*: *Brantley v. Wolf*, 60 Miss. 420,

holding that two years is a reasonable time; *Thompson v. Strickland*, 52 Miss. 574, which in effect overrules *Wallace v. Latham*, 52 Miss. 291. *Nebraska*: *Engelbert v. Troxell*, 40 Neb. 195, 58 N. W. Rep. 852; *O'Brien v. Gaslin*, 20 Neb. 347; *Ward v. Lavery*, 19 Neb. 429, 27 N. W. Rep. 393; in this case a delay of three years was adjudged too long. *South Carolina*: *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. Rep. 468; *Scott v. Scott*, 29 S. C. 414, 7 S. E. Rep. 811. *Tennessee*: *Scott v. Buchanan*, 11 Humph. 468. *Texas*: *Hieatt v. Dixon* (Tex. Civ. App.), 26 S. W. Rep. 263; *Bingham v. Barley*, 55 Tex. 281; *Ferguson v. Houston, &c. Ry. Co.* 73 Tex. 344, 11 S. W. Rep. 347, holding that two years was not a reasonable time; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372; *Askey v. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101. *Vermont*: *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Richardson v. Boright*, 9 Vt. 368. *Wisconsin*: *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. Rep. 1089; *O'Dell v. Rogers*, 44 Wis. 136, 183. The grounds for this doctrine are forcibly stated in *Goodnow v. Empire Lumber Co.* 31 Minn. 468, 472, 47 Am. Rep. 798, by Gilfillan, C. J.: "The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future, — a consequence entirely foreign to

statutes to this effect.<sup>1</sup> In the absence of a statute, however, the lapse of time after the disability is removed, without any positive act of affirmance or disaffirmance by the grantor, only raises the question of affirmance by such acquiescence.<sup>2</sup> What a reasonable

the purpose of the rule, which is solely protection to the infant. Reason, justice to others, public policy (which is not subverted by cherishing defective titles), and convenience require the right of disaffirmance to be acted upon within a reasonable time."

<sup>1</sup> *Iowa*: Code 1888, § 3429; *Green v. Wilding*, 59 Iowa, 679, 13 N. W. Rep. 761, 44 Am. Rep. 696; *Wright v. Germain*, 21 Iowa, 585; *Stout v. Merrill*, 35 Iowa, 47; *Jenkins v. Jenkins*, 12 Iowa, 195; *Jones v. Jones*, 46 Iowa, 466, 473; *Weaver v. Carpenter*, 42 Iowa, 343; *Sims v. Everhardt*, 102 U. S. 300, 309, per Strong, J.

<sup>2</sup> *Delaware*: Four years after majority is not a reasonable time. *Wallace v. Lewis*, 4 Harr. 75, 80. In *Georgia* the time is limited to seven years after the removal of the disability, after the analogy of the statute of limitations, applicable when there is written evidence of title. *Nathans v. Arkwright*, 66 Ga. 179. *Illinois*: In *Mette v. Feltgen*, 148 Ill. 357, 36 N. E. Rep. 81, 27 N. E. Rep. 911, *Blankenship v. Stout*, 25 Ill. 132; and *Cole v. Pennoyer*, 14 Ill. 158, three years after majority was held to be such reasonable time. *Indiana*: The doctrine of a reasonable time for disaffirmance is rejected in the later cases; but in some cases, in which there were circumstances to be considered other than mere delay, the doctrine has been taken into consideration. In *Scranton v. Stewart*, 52 Ind. 68, three years and a half after the grantor became of age was held to be within a reasonable time. In *Doe v. Abernathy*, 7 Blackf. 442, a disaffirmance after five years was held to be within a reasonable time. In *Hartman v. Kendall*, 4 Ind. 403, thirteen years was an unreasonable delay: "An examination of the authorities will show that the time required ranges from one to twenty years, according to the peculiar

circumstances of each case and the views of different judges and writers." Per Franklin J. *Wiley v. Wilson*, 77 Ind. 596. And see *Stringer v. Northwestern Mut. L. Ins. Co.* 82 Ind. 100; *Sims v. Bardoner*, 86 Ind. 87, 98, 44 Am. Rep. 263; *McClanahan v. Williams* (Ind.), 35 N. E. Rep. 897. *Iowa*: Three years and eight months after attaining majority was not within a reasonable time under the statute. *Green v. Wilding*, 59 Iowa, 679, 13 N. W. Rep. 761, 44 Am. Rep. 696. In *Wright v. Germain*, 21 Iowa, 585, an act of disaffirmance about two years after attaining majority was too late. In *Jones v. Jones*, 46 Iowa, 466, a disaffirmance about two years after majority was held under the circumstances not to be within a reasonable time. *Minnesota*: A delay for three years and a half is more than a reasonable time. *Goodnow v. Empire Lumber Co.* 31 Minn. 468, 18 N. W. Rep. 283, 47 Am. Rep. 798. *New Hampshire*: *State v. Plaisted*, 43 N. H. 413. *Pennsylvania*: In *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. Rep. 174, the court say: "It seems to be agreed on all sides that one entitled to avoid his deed should make and signify his election within a reasonable time, or the omission so to do may operate as an affirmance. The difficulty has been with the application of the rule, and the question, 'What is a reasonable time?' has received different answers in different jurisdictions." In the case before the court there was a delay for eighteen years after the making of the deed, and for fifteen years after the infant came of age. There were the further circumstances that the grantor had the fullest knowledge of the voidable character of the deed, of the erection of improvements on the land, and of its steady increase in value. His delay was held unreasonable, amounting to a waiver of his

time is under such a statute, or under a rule of court to the same effect, depends upon the circumstances of each case. "Thus, it would be material to inquire whether the minor was a non-resident of the State on attaining his majority; to ascertain his capacity for transacting business; what influences, if any, were brought to bear upon him by those interested in preventing a disaffirmance; and whether any suits were pending, the determination of which were material in electing to disaffirm."<sup>1</sup>

28. What is a reasonable time may be either for the court or for the jury to determine. Where there is delay merely, with nothing to explain or excuse it, or show its necessity, it is a matter for the court to determine.<sup>2</sup> Very often, however, it is a mixed question of law and fact, to be determined from the circumstances in each particular case;<sup>3</sup> and in such cases the question of reasonable time is for the jury under the instructions of the court.<sup>4</sup>

#### IX. *Avoidance of Mortgage for Purchase-money.*

29. An infant who has purchased land, and given back a mortgage for the purchase-money, or a part of it, may, upon coming of age, avoid the transaction; he may relinquish the property and reclaim the money paid on account of it.<sup>5</sup> But he must surrender and reconvey the property. If he continues to hold

right, and equivalent to an express ratification. But in *Urban v. Grimes*, 2 Grant, 96, this court held that fourteen years was not unreasonable. In the first-named case, however, the court said they would not disturb *Urban v. Grimes*, but were not willing to extend the rule there laid down. *Texas*: *Hieatt v. Dixon* (Tex. Civ. App.), 26 S. W. Rep. 263; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372, 26 Am. St. Rep. 837; *Bingham v. Barley*, 55 Tex. 281; *Stuart v. Baker*, 17 Tex. 417; *Kilgore v. Jordan*, 17 Tex. 341. In *Ferguson v. Railway Co.* 73 Tex. 344, 11 S. W. Rep. 347, after two years was held not to be a reasonable time for the minor to bring suit. In the case of *Askey v. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101, but little over one year had elapsed. Each case must rest upon its own merits as to

what is a reasonable time. *Vermont*: In *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589, it was held that eleven years after majority was not a reasonable time.

<sup>1</sup> *Jenkins v. Jenkins*, 12 Iowa, 195.

<sup>2</sup> *Goodnow v. Empire Lumber Co.* 31 Minn. 468, 18 N. W. Rep. 283, 47 Am. Rep. 798; *State v. Plaisted*, 43 N. H. 413. In *Wiley v. Wilson*, 77 Ind. 596, it was declared that the reasonableness of time was a question for the jury.

<sup>3</sup> *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. Rep. 852; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. Rep. 372, 26 Am. St. Rep. 837.

<sup>4</sup> *State v. Plaisted*, 43 N. H. 413.

<sup>5</sup> *Willis v. Twambly*, 13 Mass. 204. By statute in Ohio a woman of the age of eighteen years may execute a valid conveyance. R. S. 1880, §§ 4106, 4107.

the estate and apply it to his own uses, he affirms the mortgage.<sup>1</sup> He must do this within a reasonable time.<sup>2</sup> If he ratifies the conveyance to himself, he ratifies the mortgage for the purchase-money. They constitute one transaction, and he cannot enjoy the one without being bound by the other.<sup>3</sup> If an action to foreclose the mortgage be brought after his coming of age, and he allows a decree of sale to be entered, he cannot then, upon finding there is a deficiency instead of a surplus, escape liability for it by setting up his disability.<sup>4</sup> If his mortgage be foreclosed and the property sold under judgment in the suit, by bringing ejectment against the purchaser he not only affirms the deed, but the mortgage, because he thereby claims title under the deed.<sup>5</sup>

30. The same rule applies in case the deed to the infant reserves a lien for the purchase-money. He cannot retain the land and repudiate the lien, which is in effect a mortgage.<sup>6</sup> In like manner, if an infant has purchased land and given his unsecured note for the purchase-money, or some part of it, he cannot, upon coming of age, retain the property and plead infancy as to the note.<sup>7</sup> If the infant's guardian has given a note and mortgage for a balance of the purchase-money for land conveyed to the infant, and the infant on attaining majority repudiates the

<sup>1</sup> *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Robbins v. Eaton*, 10 N. H. 561; *Heath v. West*, 28 N. H. 101; *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89, 19 Am. Dec. 194; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Callis v. Day*, 38 Wis. 643; *Weed v. Beebe*, 21 Vt. 495; *Richardson v. Boright*, 9 Vt. 368; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Langdon v. Clayson*, 75 Mich. 204; *Young v. McKee*, 13 Mich. 552; *Henry v. Root*, 33 N. Y. 526, 553; *Lynde v. Budd*, 2 Paige, 191, 21 Am. Dec. 84; *Kitchen v. Lee*, 11 Paige, 107, 42 Am. Dec. 101; *Coutant v. Servoss*, 3 Barb. 128; *Ottman v. Moak*, 3 Sandf. Ch. 431; *Grace v. Whitehead*, 7 Grant U. C. 591; *Kennedy v. Baker*, 159 Pa. St. 146, 28 Atl. Rep. 252; *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654; *Betts v. Carroll*, 6 Mo. App. 518; *McClure v. McClure*, 74 Ind. 108; *Uecker v. Koehn*, 21 Neb. 559, 59 Am. Rep. 849; *Hook v. Donaldson*, 9 Lea, 56; *Utermehle v. McGreal*, 1 D. C. App. 359; *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. Rep. 805.

<sup>2</sup> *Rapid Transit Land Co. v. Sanford* (Tex.), 24 S. W. Rep. 587, holding that four months after becoming of age is a reasonable time.

<sup>3</sup> *Dana v. Coombs*, 6 Me. 89, 19 Am. Dec. 194; *Heath v. West*, 28 N. H. 101; *Langdon v. Clayson*, 75 Mich. 204.

<sup>4</sup> *Flinn v. Powers*, 35 How. Pr. 279, affirming 36 How. Pr. 289; *Terry v. McClintock*, 41 Mich. 492, 2 N. W. Rep. 787.

<sup>5</sup> *Kennedy v. Baker*, 159 Pa. St. 146, 28 Atl. Rep. 352.

<sup>6</sup> *Smith v. Henkel*, 81 Va. 524.

<sup>7</sup> *Philpot v. Sandwich Manuf. Co.* 18 Neb. 54; *Weed v. Beebe*, 21 Vt. 495; *Kitchen v. Lee*, 11 Paige, 107, 42 Am. Dec. 101; *Strain v. Wright*, 7 Ga. 568.

purchase, the mortgage may be foreclosed and the proceeds applied first to refunding the money paid by the infant at the time of the purchase, and next to the payment of the note and mortgage.<sup>1</sup>

Where the infant's mortgage was given to secure the payment of money borrowed by him, and not for purchase-money, his continuing in possession of the land after he is of full age, and refusing to pay the note, do not constitute a satisfaction of the mortgages.<sup>2</sup> But if an infant buys land which is subject to a mortgage which he assumes as a part of the consideration of the conveyance, and subsequently, but before he comes of age, conveys the land to another for a larger price, his retention of the proceeds of such sale after he comes of age is not such an affirmation of his contract as to render him liable on his covenant to pay the mortgage.<sup>3</sup>

If an infant purchasing land has assumed the payment of liens upon it, and to pay these has executed during his minority a mortgage to secure a loan, he cannot, upon arriving at full age, ratify his purchase of the land without at the same time ratifying the mortgage.<sup>4</sup>

#### X. *Restoration of Purchase-money.*

31. The grantor is not required to restore the purchase-money, if he has spent it or lost it,<sup>5</sup> in order to disaffirm a con-

<sup>1</sup> Scott v. Scott, 29 S. C. 414.

<sup>2</sup> Baker v. Stone, 136 Mass. 405.

<sup>3</sup> Walsh v. Powers, 43 N. Y. 23, 3 Am. Rep. 654. And see Carrell v. Potter, 23 Mich. 377.

<sup>4</sup> Langdon v. Clayton, 75 Mich. 204, 42 N. W. Rep. 805.

<sup>5</sup> Tucker v. Moreland, 10 Pet. 58, 73; Sims v. Everhardt, 102 U. S. 300. **Alabama**: Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732. **Arkansas**: Stull v. Harris, 51 Ark. 294, 11 S. W. Rep. 104; St. Louis, &c. Ry. Co. v. Higgins, 44 Ark. 293. **Illinois**: Reynolds v. McCurry, 100 Ill. 356. **Indiana**: Pitcher v. Laycock, 7 Ind. 398; Dill v. Bowen, 54 Ind. 204; Miles v. Lingermer, 24 Ind. 385. **Massachusetts**:

Chandler v. Simmons, 97 Mass. 508, 514, 93 Am. Dec. 117. **Minnesota**: Dawson v. Helmes, 30 Minn. 107, 14 N. W. Rep. 462. **Mississippi**: Harvey v. Briggs, 68 Miss. 60, 8 So. Rep. 274; Brantley v. Wolf, 60 Miss. 420, overruling Ferguson v. Bobo, 54 Miss. 121. **Missouri**: Craig v. Van Bebber, 100 Mo. 584, 13 S. W. Rep. 906, 18 Am. St. Rep. 569, overruling Highley v. Barron, 49 Mo. 103; Baker v. Kennett, 54 Mo. 82; Kerr v. Bell, 44 Mo. 120. **Montana**: Clark v. Tate, 7 Mont. 171, 14 Pac. Rep. 761. **Nebraska**: Englebert v. Troxell, 40 Neb. 195, 58 N. W. Rep. 852; Rea v. Bishop (Neb.), 59 N. W. Rep. 555. **New York**: Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233. **Ohio**: Cresinger v. Welch, 15 Ohio 156, 45 Am. Dec. 565. **Pennsylvania**: Shaw v. Boyd, 5 S. & R. 309,

veyance voidable on account of infancy. If the return of the consideration were a condition attached to the right of the grantor to avoid his deed, the privilege would fail to protect him when he most needed protection.<sup>1</sup> But if the grantor, when avoiding his conveyance made during minority, has in his hands any of its fruits specifically, such as a note or mortgage, or other property taken in exchange, his act in avoiding the conveyance will divest him of all right to retain such securities or property, and the other party may reclaim it.<sup>2</sup> As already observed, if he retains and uses such property or collects such securities after coming of age, this is an affirmation of the conveyance, and he is deprived of his right to avoid it. The cases go to the extent of holding that he must return such part of the consideration or money as he has not used or wasted at the time he attains full age.<sup>3</sup> To contest his

9 Am. Dec. 368. *Virginia*: *Bedinger v. Wharton*, 27 Gratt. 857.

In *New Hampshire* and *Texas* it is held that complete restoration of the purchase-money must be made in all instances, whether the grantor has it in kind or not. *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Heath v. Stevens*, 48 N. H. 251; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Fitts v. Hall*, 9 N. H. 441; *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801; *Ferguson v. Houston, &c. Ry. Co.* 73 Tex. 344; *Stuart v. Baker*, 17 Tex. 417; *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119; *Wade v. Love*, 69 Tex. 522.

In *Utermehle v. McGreal*, 1 D. C. App. 359, 375. very nearly the same view is taken, and it is declared that it is immaterial that the consideration has changed form since the conveyance, and is not on hand in specie. *Shepard, J.*, said: "We are of the opinion that the safer course lies between the extreme rule prevailing in *Texas*, and probably in *New Hampshire*, that the consideration must in all cases be restored before disaffirmance can be made effective, and the other that the return will be required only where the infant has it in specie, or has retained and disposed of it, with full knowledge, after arriving at his majority. It is, in our view, impracticable to attempt to make a general rule applicable to all cases; each must

be decided in accordance with its own peculiar facts. The infant should be fully protected from those who deal with him, knowing his infancy, and with intent to overreach him, or who, with an eye single to their own advantage, disregard his apparent disability, or his known improvidence and recklessness, and do him real injury, though it may be in no other way than by placing it within his power to stimulate and gratify inclinations and appetites which he has not the discretion or strength of character to control."

<sup>1</sup> *Craig v. Van Bebber*, 100 Mo. 584, 590, 13 S. W. Rep. 906, per *Black, J.*

<sup>2</sup> *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117; *Boody v. McKenney*, 23 Me. 517; *Brantley v. Wolf*, 60 Miss. 420, 433; *Wilie v. Brooks*, 45 Miss. 542; *Gillespie v. Bailey*, 12 W. Va. 70, 92, 29 Am. Rep. 445; *Price v. Furman*, 27 Vt. 268, 270, 65 Am. Dec. 194; *Kline v. Beebe*, 6 Conn. 494; *Thormachlen v. Kaepfel*, 86 Wis. 378, 56 N. W. Rep. 1089; *Callis v. Day*, 38 Wis. 643; *Knaggs v. Green*, 48 Wis. 601, 4 N. W. Rep. 760, 33 Am. Rep. 838; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Kerr v. Bell*, 44 Mo. 120; *Bailey v. Barnberger*, 11 B. Mon. 113; *Hillyer v. Bennett*, 3 Edw. Ch. 222.

<sup>3</sup> *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. Rep. 906; *Manning v. John-*

disaffirmance of the deed, however, on the ground that the grantor has not returned the consideration, one must show what, if any, consideration he did receive, and what remained in his hands when he came of age;<sup>1</sup> but he is not required to return an equivalent for such part thereof as he may have disposed of during his minority.<sup>2</sup> A conveyance, by a person of full age, of lands which he had received in exchange, while under age, for lands conveyed by him while under age, may be held to be a confirmation of the deed made by him while under age.<sup>3</sup>

32. A return of the consideration is not a condition precedent to a disaffirmance of an infant's deed. "If it were so, the

son, 26 Ala. 446, 62 Am. Dec. 732; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640; *Dill v. Bowen*, 54 Ind. 204; *Bedinger v. Wharton*, 27 Gratt. 857.

<sup>1</sup> *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. Rep. 852; *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. Rep. 1039; *Reynolds v. McCurry*, 100 Ill. 356; *Miller v. Smith*, 26 Minn. 248, 2 N. W. Rep. 942, 37 Am. Rep. 407.

<sup>2</sup> *Dill v. Bowen*, 54 Ind. 204; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. Rep. 852.

In California it is provided by statute, Civ. Code, § 35, that the contract of a minor, if made while he is under the age of eighteen, may be disaffirmed by him either before his majority, or within a reasonable time afterwards; and if made by a minor over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration or paying its equivalent. In the latter case, the statute is regarded as making the restoration of the consideration or its equivalent a condition precedent to a disaffirmance; but if the conveyance was made by a minor under eighteen years, the return of the consideration is not a condition precedent to a disaffirmance. *Combs v. Hawes* (Cal.), 8 Pac. Rep. 597. For a similar statute in Dakota, see Civ. Code, § 17, Comp. Laws 1887, § 2516.

In Indiana, 2 R. S. 1888, § 2945, it is provided that an infant shall not be per-

mitted to disaffirm his sale without first restoring the consideration received, if he falsely represent himself or herself to the purchaser to be of age, and the purchaser acting in good faith relied upon such representation, and had good cause to believe such infant to be of full age. As to restoration of consideration by an infant *feme covert*, see 2 R. S. 1888, § 2944.

In Iowa the Code, § 2238, provides that a minor is bound by his contract, unless he disaffirms it, and restores to the other party all money or property received by him by virtue of his contract, and remaining within his control. Construing this section of the Code, the Supreme Court, in *Hawes v. Railroad Co.* 64 Iowa, 315, 20 N. W. Rep. 717, held that, where a minor had disaffirmed a contract, he was only required to return the identical money or property received by him for the execution of such contract remaining in his possession at the time of his disaffirmance thereof. The court said: "It is not shown or pretended that he had remaining under his control, at any time after attaining his majority, the money or property received by him by virtue of the contract, and it is only such money or property as may thus remain that he is bound to restore." And see, to same effect, *Jenkins v. Jenkins*, 12 Iowa, 195; *Leacox v. Griffith*, 76 Iowa, 89, 94, 40 N. W. Rep. 109.

<sup>3</sup> *Williams v. Maber*, 7 N. J. Eq. 500; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. Rev. 538.

privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity that this right is maintained. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all, so that it will no longer protect him in the retention of the consideration. Or, if he retain and use or dispose of such property after becoming of age, it may be held as an affirmation of the contract by which he acquired it, and thus deprive him of the right to avoid. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed *in statu quo*.”<sup>1</sup> To like effect the Court of Appeals of New York said: “The right to rescind is a legal right established for the protection of the infant; and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle, we think a restoration of the consideration could not be exacted as a condition to a rescission on the part of the defendant.”<sup>2</sup>

For the same reason, the deed of an insane person which he has never ratified may be avoided without first restoring the consideration to the grantee.<sup>3</sup>

33. It is undoubtedly the general rule that a party seeking to rescind a contract must restore the consideration, or put

<sup>1</sup> *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117, per Wells, J.

<sup>2</sup> *Green v. Green*, 69 N. Y. 553, 556, 25 Am. Rep. 233, per Church, Ch. J.

<sup>3</sup> *Gibson v. Soper*, 6 Gray, 279, 282, 66 Am. Dec. 414. “If the law required restitution of the price as a condition pre-

cedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly, and the great purpose of the law in avoiding such contracts, the protection of those who cannot protect themselves, defeated.” Per Thomas, J.



the other party *in statu quo*. But, without doing this, an infant may be relieved of his executed contract. This exception to the rule is founded on the deficient capacity of the infant to enter into a binding contract. In some decisions the general rule has been applied to the case of infants seeking to avoid their executed contracts.<sup>1</sup> But the weight of authority as well as the weight of argument supports this exception, that to give effect to a disaffirmance of an infant's deed it is not necessary that his grantee should be placed *in statu quo* by the restoration of the consideration he has paid.<sup>2</sup>

34. If the infant's conveyance was made without consideration, or the consideration was paid to some one else, of course when the infant comes of age he may disaffirm his deed without offering to restore any consideration.<sup>3</sup>

One who deals with a minor with full knowledge of his minority cannot demand a return of the consideration as a condition precedent to the minor's right to disaffirm his deed.<sup>4</sup>

35. If the grantor goes into equity to have his conveyance set aside on account of his infancy at the time he made it,

<sup>1</sup> Bartlett v. Cowles, 15 Gray, 445.

<sup>2</sup> Alabama: Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Eureka Co. v. Edwards, 71 Ala. 248. Arkansas: St. Louis, &c. Ry. Co. v. Higgins, 44 Ark. 293, 297. Georgia: Shuford v. Alexander, 74 Ga. 293. Illinois: Reynolds v. McCurry, 100 Ill. 356. Indiana: Law v. Long, 41 Ind. 586; Richardson v. Pate, 93 Ind. 423, 47 Am. Rep. 374; Dill v. Bowen, 54 Ind. 204; Shirk v. Shultz, 113 Ind. 571. Kentucky: Vallandigham v. Johnson, 85 Ky. 288, 3 S. W. Rep. 288. Maine: Robinson v. Weeks, 56 Me. 102. Massachusetts: Chandler v. Simmons, 97 Mass. 508, 514, 93 Am. Dec. 117; Bartlett v. Drake, 100 Mass. 174, 176, 97 Am. Dec. 92, per Wells, J.; Walsh v. Young, 110 Mass. 396. Michigan: Corey v. Burton, 32 Mich. 30. Minnesota: Dawson v. Helms, 30 Minn. 107, 14 N. W. Rep. 462; Miller v. Smith, 26 Minn. 248, 37 Am. Rep. 407. Mississippi: Cook v. Toumbs, 36 Miss. 685; Brantley v. Wolf, 60 Miss. 420, 423. Missouri: Craig v. Van Bebber, 100 Mo. 584, 13 S. W. Rep. 906; Lacy v. Pixler, 120

Mo. 383, 25 S. W. Rep. 206. Montana: Clark v. Tate, 7 Mont. 171, 14 Pac. Rep. 761. New York: Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233, 7 Hun, 492. Ohio: Lemmon v. Beeman, 45 Ohio St. 505. Pennsylvania: Ruchizky v. De Haven, 97 Pa. St. 202, 210. Vermont: Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Weed v. Beebe, 21 Vt. 495.

<sup>3</sup> Vogelsang v. Null, 67 Tex. 465, 3 S. W. Rep. 451; Englebert v. Troxell, 40 Neb. 195, 58 N. W. Rep. 852. In this case an infant conveyed his real estate in consideration of \$240 in cash paid to the infant's father. The father purchased a piano for the infant with the money. The infant, on coming of age, had in his possession the piano and disaffirmed the deed. It was held that, as a condition precedent to his right to disaffirm the deed, he was under no legal obligation to tender or surrender the piano, nor repay the money which the grantee had paid the infant's father.

<sup>4</sup> Shaul v. Rinker (Ind.), 38 N. E. Rep. 593.

some authorities hold that he must do equity to the grantee by refunding the consideration received.<sup>1</sup> But the better rule is, that the disability of infancy will be recognized in equity to the same extent that it is recognized at law; that if the grantor, when he seeks to obtain relief in equity from his deed made during minority, retains the consideration or any part of it, he may be required to restore such consideration to the grantee; but that, if he no longer has in his hands the consideration received, he is not required to restore it or its equivalent.<sup>2</sup>

<sup>1</sup> *Hillyer v. Bennett*, 3 Edw. Ch. 222; 46 Am. Rep. 314; *Stall v. Harris*, 51 Ark. Gray v. Lessington, 2 Bosw. 257; *Stout v.* 294, 11 S. W. Rep. 104; *Brandon v. Merrill*, 35 Iowa, 47; *Smith v. Evans*, 5 Brown, 106 Ill. 519; *Reynolds v. McHumph.* 70; *Bozeman v. Browning*, 31 Curry, 100 Ill. 356; *Weed v. Beebe*, 21 Ark. 365; *Folts v. Ferguson*, 77 Tex. 301, Vt. 495; *Bedinger v. Wharton*, 27 Gratt. 13 S. W. Rep. 1037. 857; *Gillespie v. Bailey*, 12 W. Va. 70, 29

<sup>2</sup> *Eureka Co. v. Edwards*, 71 Ala. 248, Am. Rep. 445.

## CHAPTER II.

### DISABILITY OF MARRIED WOMEN.

I. Common-law disability and statutes removing, 36-39.	convey to each other at law, 40-44.
II. Disability of husband and wife to	III. Conveyance between husband and wife good in equity, 45-47.

#### I. *Common-law Disability and Statutes removing.*

36. By the common law a married woman could not convey her land either by her separate deed or by joining in a conveyance with her husband. This disability was an incident to her coverture. The fictitious proceeding of a fine and common recovery was resorted to for the conveyance of the real estate of a married woman, and this method prevailed in England until the year 1833, when she was authorized to convey her lands by deed and judicial acknowledgment.<sup>1</sup> It was not competent to levy a fine without the concurrence of the husband. In the United States, during the early colonial period, fines and recoveries were sometimes resorted to; but by usage, from the first settlement of several of the colonies, a married woman might convey her real estate by deed with the assent and joinder of her husband. This usage early became a part of the common law of New England, New York, and Pennsylvania, and the statutes soon recognized and confirmed the common usage.<sup>2</sup>

At common law, even as modified by usage in this country, both the husband and the wife were seised of her real estate, he of the freehold and she of the fee therein. A conveyance could only be made by both joining in the grant. "In a sale or grant of real

<sup>1</sup> Stat. 3 & 4 Wm. IV. ch. 74.

<sup>2</sup> *Manchester v. Hough*, 5 Mason, 67, 68, per Story, J.; *Durant v. Ritchie*, 4 Mason, 45, per Story, J.; *Elliott v. Peirsol*, 1 Pet. 328; *Davey v. Turner*, 1 Dall. 11; *Lloyd v. Taylor*, 1 Dall. 17; *Fowler v. Shearer*, 7 Mass. 14, where Chief Justice Parsons said it had been an immemorial usage;

*Colcord v. Swan*, 7 Mass. 291; *Lithgow v. Kavenagh*, 9 Mass. 161; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9; *Van Winkle v. Constantine*, 10 N. Y. 422; *Jackson v. Gilchrist*, 15 Johns. 89, 110; *Blythe v. Dargin*, 68 Ala. 370; *Gordon v. Haywood*, 2 N. H. 402.

estate, where the title proceeds from her, the husband and wife are as one grantor. They act together in her right, his concurrence being essential to the validity of the conveyance; and she is to be joined with him in the operative words and stipulations of the conveyance."<sup>1</sup>

37. At the present time there are statutes in all the States regulating conveyances by married women. The course of modern legislation has constantly tended towards giving to married women full control over their property without the assent or concurrence of their husbands. These statutes are in derogation of the common law, inasmuch as they confer a capacity to contract and convey upon persons who formerly had no capacity at all; and therefore all requirements of the enabling statutes, whether in regard to the execution or acknowledgment of the deed, must be strictly complied with.<sup>2</sup>

In about half in number of the States a married woman can convey her land only with the assent and concurrence of her husband manifested by his joining with her in the conveyance.<sup>3</sup> In

<sup>1</sup> *Lithgow v. Kavenagh*, 9 Mass. 161, 173, per Sewall, J. See, also, *Jewett v. Davis*, 10 Allen, 68; *Clark v. Clark*, 16 Oreg. 224, 18 Pac. Rep. 1; *Trimmer v. Heagy*, 16 Pa. St. 484; *Stoops v. Blackford*, 27 Pa. St. 213; *Glidden v. Strupler*, 52 Pa. St. 400.

<sup>2</sup> *Elliott v. Peirsol*, 1 Pet. 328; *Glidden v. Strupler*, 52 Pa. St. 400; *Good v. Zercher*, 12 Ohio, 364; *James v. Fisk*, 9 Sm. & M. 144; *Lewis v. Waters*, 3 Har. & McH. 430; *Rake v. Lawshee*, 24 N. J. L. 613; *Spencer v. Reese* (Pa. St.), 30 Atl. Rep. 722, relating to acknowledgment by wife; *Louisville, &c. Ry. Co. v. Stephens* (Ky.), 29 S. W. Rep. 14.

<sup>3</sup> *Alabama*: Code 1886, § 2348. The distinction which formerly prevailed between equitable and statutory separate estates is abrogated unless the property is held by an active trustee; in that case alone the wife cannot dispose of her separate estate without the assent of her husband. *Scharf v. Moore* (Ala.), 14 So. Rep. 879; *Rooney v. Michael*, 84 Ala. 585, 4 So. Rep. 421. *Connecticut*: G. S. 1888, § 2960. *Delaware*: R. Code 1893, ch. 83, § 4. *Florida*: R. S. 1892, § 1956.

*Idaho*: R. S. 1887, § 2922. *Illinois*: R. S. 1889, ch. 30, § 18. *Indiana*: R. S. 1894, § 3340. *Kentucky*: G. S. 1894, §§ 506, 2128. *Maryland*: Laws 1888, ch. 329. *Minnesota*: G. S. 1894, § 4161; *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. Rep. 1018. *Missouri*: 1 R. S. 1889, § 2396. Under § 6864, which enables a married woman to contract, a mortgage by a married woman on land which she owned, but which was not her separate property as defined by § 6869, though void as a conveyance because her husband did not join therein, as provided by § 2396, is good as a contract to convey or an equitable mortgage. *Brown v. Dressler* (Mo.), 29 S. W. Rep. 13. *Montana*: Comp. Stats. 1887, p. 656, § 236. *Nevada*: G. S. 1885, § 2570. *New Hampshire*: P. S. 1891, ch. 176, § 3. *New Jersey*: R. S. 1877, p. 639. But the married woman may convey without her husband joining, provided the deed is in execution of a written contract by her to which her husband is a party or has assented in writing, and the contract is duly acknowledged by both and recorded. Laws 1892, ch. 170. She may release dower without her hus-

several States it is declared that a married woman may convey her land in the same manner and with like effect as if she were not married.<sup>1</sup> In a few States it is expressly declared that a married woman may convey her land as if she were unmarried, and without the consent or joinder of her husband in the conveyance.<sup>2</sup>

38. A provision requiring the joinder of the husband in a deed by the wife of her real estate is generally met by his expressing his assent thereto under his hand and seal without joining in the granting clause of the deed.<sup>3</sup> In some States the statutes provide that the deed must be made with the husband's assent or written assent. If the statute requires joinder of the husband, it is not that he has anything to convey, unless it be his tenancy by the curtesy, but to prevent an improvident conveyance by the wife of property which she presumably holds to some

band joining in land conveyed by him, or sold under judgment or decree. Supp. 1886, p. 447. **New Mexico**: Comp. Stats. 1884, § 1088. **North Carolina**: Const. art. 10, § 6; Code 1883, § 1256; *Ray v. Wilcoxon*, 107 N. C. 514, 12 S. E. Rep. 443. **Oregon**: G. L. 1892, § 3003; *Elliott v. Teal*, 5 Saw. 249. **Pennsylvania**: *Brightley's Purdon's Dig.* 1894, p. 1299; *Laws* 1893, p. 344, § 1; *Hirsch v. Tillman*, 2 Pa. Dist. 662; *Dunham v. Wright*, 53 Pa. St. 167; *Buchanan v. Hazzard*, 95 Pa. St. 240. **Tennessee**: Code 1884, § 2891. **Texas**: R. Civ. Stats. 1889, art. 559; *Cannon v. Boutwell*, 53 Tex. 626. **Vermont**: R. L. 1880, § 1923. **W. Virginia**: Acts 1893, ch. 3, § 3.

<sup>1</sup> **Arkansas**: *Dig. of Stats.* 1884, § 4621. **Colorado**: G. S. 1883, § 2278. **Georgia**: Code 1882, § 2706 a. **Iowa**: In same manner and to same extent as any other person. R. S. 1888, § 3106. **Massachusetts**: Except that a married woman cannot, without the written consent of her husband, impair his tenancy by the curtesy or his tenancy for life, in one half her real estate, in case the husband and wife have had no issue born alive which might have inherited such estate. P. S. 1882, ch. 147, § 1; Acts 1889, ch. 204. **Michigan**: 2 Annot. Stats. 1882, § 6295. **Nebraska**: In same manner, to the same extent, and with like effect, as

a married man may. Comp. Stats. 1893, ch. 53, § 2. **New York**: R. S. 1889, p. 2603. **Ohio**: R. S. 1890, § 3112. **Oklahoma T.**: G. S. 1893, § 1616. **South Carolina**: G. S. 1882, § 2036. **Utah**: In same manner as any other person. Comp. Laws 1888, § 2640. **Virginia**: Code 1887, § 2286. **Washington**: To same extent and in same manner that her husband can. G. S. 1891, § 1398. **Wisconsin**: By joint or separate deed as if unmarried. Annot. Stats. 1889, § 2221. **Wyoming**: R. S. 1887, § 2.

<sup>2</sup> **Arizona T.**: R. S. 1887, § 225. **California**: Civ. Code, § 162. **Maine**: R. S. 1883, ch. 61, § 1. **North Dakota**: Comp. Laws 1887, § 2593. **South Dakota**: Comp. Laws 1887, § 2593.

<sup>3</sup> *Schley v. Pullman Car Co.* 25 Fed. Rep. 890; *Dentzel v. Waldie*, 30 Cal. 138; *Bray v. Clapp*, 80 Me. 277, 13 Atl. Rep. 900; *Woodward v. Seaver*, 38 N. H. 29; *Elliot v. Sleeper*, 2 N. H. 525; *Hills v. Bearse*, 9 Allen, 403; *Evans v. Summerlin*, 19 Fla. 858; *Stone v. Montgomery*, 35 Miss. 83; *Armstrong v. Stovall*, 26 Miss. 275; *Thompson v. Lovrein*, 82 Pa. St. 432; *Clark v. Clark*, 16 Ore. 224, 18 Pac. Rep. 1; *Friedenwald v. Mullan*, 10 Heisk. 226; *Mount v. Kesterson*, 6 Coldw. 452; *Ochoa v. Miller*, 59 Tex. 460, 462.

extent for their common use and benefit. But there are many decisions to the effect that a joinder in the deed means joining as a grantor; and that the husband's signing, sealing, and acknowledging an instrument, which the wife has executed for the conveyance of her land, is not sufficient. It is said that the execution of the instrument in this way by the husband may sufficiently manifest his consent to the conveyance, but that such an execution of it is not a joinder in the conveyance.<sup>1</sup> In order to make a joint conveyance it is not necessary that both husband and wife should sign and acknowledge simultaneously. Thus, the fact that the wife signs and acknowledges the deed two years after it is signed and acknowledged by her husband does not invalidate the deed, in the absence of any intervening rights of third persons.<sup>2</sup> It is not essential that they should both acknowledge before the same officer, or that their acknowledgments should be certified by a single certificate.<sup>3</sup>

39. There are statutes in some States providing for the execution, in certain cases, of a separate deed by a married woman, as in case her husband is insane, or has deserted her, or is living separate from her; but where the statute enabling a married woman to convey her property by deed provides for the joinder of her husband in her deed of conveyance, her separate deed is void though her husband be insane, or has deserted her, or is living separate from her, unless special exceptions be made for these cases. Thus, in case the husband has deserted the wife without providing for her support, though the sale of her real estate is necessary for the maintenance of herself and family, she cannot make a valid separate deed even for a full consideration paid.<sup>4</sup> Even where a married woman, whose husband had deserted her, bought a tract of land and immediately mortgaged it back to secure the purchase-money, her mortgage was declared void at law, notwithstanding the apparent want of equity in so holding.<sup>5</sup>

<sup>1</sup> *Blythe v. Dargin*, 68 Ala. 370; *Gray v. Mathis*, 7 Jones, 502; *Warner v. Peck*, 11 R. I. 431.

<sup>2</sup> *Halbert v. Hendrix* (Tex. Civ. App.), 26 S. W. Rep. 911.

<sup>3</sup> *Ludlow v. O'Neill*, 29 Ohio St. 181.

<sup>4</sup> *Richards v. McClelland*, 29 Pa. St. 385.

<sup>5</sup> *Concord Bank v. Bellis*, 10 Cush. 276; *Eaton v. George*, 40 N. H. 258, 42 N. H. 375; *Pike v. Clark*, 40 N. H. 9, 77 Am. Dec. 698; *Leach v. Noyes*, 45 N. H. 364.

## II. *Disability of Husband and Wife to convey to each other at Law.*

40. A conveyance by the husband to the wife or by the wife to the husband is void at law, because the legal existence of the wife is merged in the husband. It does not pass the legal title.<sup>1</sup>

A husband and wife cannot make partition of land held in common by releasing to each other their respective interests.<sup>2</sup>

41. The statutes and constitutional provisions empowering a married woman to convey as if she were unmarried are held to remove her disability and empower her to convey directly to her husband, and the husband to convey directly to his wife.<sup>3</sup>

<sup>1</sup> Co. Litt. 112 a; *Smith v. Seiberling*, 35 Fed. Rep. 677.

**Alabama:** Prior to February 28, 1887: *Maxwell v. Grace*, 85 Ala. 577, 5 So. Rep. 319; *Gaston v. Weir*, 84 Ala. 193, 4 So. Rep. 258; *Powe v. McLeod*, 76 Ala. 418; *Meyer v. Sulzbacher*, 75 Ala. 423; *McMillan v. Peacock*, 57 Ala. 127; *Manning v. Pippen*, 86 Ala. 357, 5 So. Rep. 572. **Arkansas:** *Ogden v. Ogden* (Ark.), 28 S. W. Rep. 796. **California:** Prior to the statute of 1891: *Rico v. Brandenstein* (Cal.), 33 Pac. Rep. 480. **Connecticut:** *Underhill v. Morgan*, 33 Conn. 105. **Florida:** *Waterman v. Higgins*, 28 Fla. 660, 10 So. Rep. 97. **Illinois:** *Dale v. Lincoln*, 62 Ill. 22. **Indiana:** *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679. **Kentucky:** *Doty v. Cox* (Ky.), 22 S. W. Rep. 321. **Maine:** Prior to act of 1847, ch. 27, and act of 1852, ch. 227: *Savage v. Savage*, 80 Me. 472, 15 Atl. Rep. 43; *Johnson v. Stillings*, 35 Me. 427; *Allen v. Hooper*, 50 Me. 371. **Maryland:** *Preston v. Fryer*, 38 Md. 221; *Gebb v. Rose*, 40 Md. 387, husband may convey directly to wife; *Laws* 1892, ch. 586. **Michigan:** *Ransom v. Ransom*, 30 Mich. 328. **Minnesota:** *Wilder v. Brooks*, 10 Minn. 50, 54, 88 Am. Dec. 49. **Mississippi:** *Wells v. Wells*, 35 Miss. 638; *Ratcliffe v. Dougherty*, 24 Miss. 181. **Missouri:** *Crawford v. Whitmore*, 125 Mo. 144, 25 S. W. Rep. 365, overruling *Bangert v. Bangert*, 15 Mo. App. 144; *Cooper v. Standley*, 40 Mo.

App. 138. **Nebraska:** *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867; *Johnson v. Vandervort*, 16 Neb. 144; *Smith v. Dean*, 15 Neb. 432. **New York:** *Shepard v. Shepard*, 7 Johns. Ch. 57, 11 Am. Dec. 396; *Voorhees v. Presbyterian Church*, 17 Barb. 103; *Simmons v. McElwain*, 26 Barb. 419; *Winans v. Peebles*, 32 N. Y. 423; *Dempsey v. Tylee*, 3 Duer, 73; *Berkowitz v. Brown*, 23 N. Y. Supp. 792, 3 Misc. 1; *Dean v. Metropolitan Ry. Co.* 119 N. Y. 540, 28 N. E. Rep. 1054, before statute 1887, ch. 537. **North Carolina:** *Warlick v. White*, 86 N. C. 139, 41 Am. Rep. 453. **Ohio:** *Crooks v. Crooks*, 34 Ohio St. 610; *Fowler v. Trebeiu*, 16 Ohio St. 493. **Oregon:** *Miller v. Miller*, 17 Oreg. 423, 21 Pac. Rep. 938. **Pennsylvania:** *Stickney v. Borman*, 2 Pa. St. 67; *Coates v. Gerlach*, 44 Pa. St. 43. **South Carolina:** *Trustees v. Bryson*, 34 S. C. 401, 13 S. E. Rep. 619. **Texas:** *Stiles v. Japhet*, 84 Tex. 91, 19 S. W. Rep. 450; *Graham v. Stuve*, 76 Tex. 533. **Wisconsin:** *Kinney v. Dexter*, 81 Wis. 80, 51 N. W. Rep. 82; *Putnam v. Bicknell*, 18 Wis. 333; *Albright v. Albright*, 70 Wis. 528, 36 N. W. Rep. 254.

<sup>2</sup> *Frissell v. Rozier*, 19 Mo. 448.

<sup>3</sup> **Colorado:** *Wells v. Caywood*, 3 Colo. 487. **Iowa:** *Blake v. Blake*, 7 Iowa, 46; *Robertson v. Robertson*, 25 Iowa, 350. **Maine:** *Allen v. Hooper*, 50 Me. 371; *Johnson v. Stillings*, 35 Me. 427; *Savage v. Savage*, 80 Me. 472, 15 Atl. Rep. 43.

But in New York the statute enabling a married woman to convey her land as if she were unmarried is held not to remove her disability to make a conveyance directly to her husband.<sup>1</sup> Though the intention of such statutes was undoubtedly to confer upon the wife the legal capacity of a *feme sole* in respect to conveyances of her property, it does not follow that she can convey to her husband, for no such question could possibly arise in respect to a *feme sole*. Such statutes were intended to remove the disability of coverture, and enable the wife to make conveyances not forbidden by special provisions of law. It is not the disability of the wife alone that renders void her conveyance to her husband. The husband is as much disabled to take under such a conveyance as she is to convey.<sup>2</sup>

42. If the wife is under disability to convey her lands except by a deed in which her husband joins, she cannot convey to him directly, but only through a third person, though in the same State the husband may convey directly to his wife.<sup>3</sup>

**Michigan** : *Burdens v. Amperse*, 14 Mich. 91, 90 Am. Dec. 225; *Witbeck v. Witbeck*, 25 Mich. 439; *Ransom v. Ransom*, 30 Mich. 328; *De Vries v. Conklin*, 22 Mich. 255. **North Carolina** : Const. art. 10, § 6; *Walker v. Long*, 109 N. C. 510, 14 S. E. Rep. 299. It is unnecessary to the validity of the husband's conveyance to his wife that it should be made in consideration of her support and maintenance. *Fort v. Allen*, 110 N. C. 183, 14 S. E. Rep. 685; *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. Rep. 482. **Tennessee** : *Vick v. Gower* (Tenn.), 21 S. W. Rep. 677. **Wisconsin** : *Beard v. Dedolph*, 29 Wis. 136.

Probably the statutes in **Arizona**, **California**, **North Dakota**, and **South Dakota** also enable husband and wife to convey to each other.

<sup>1</sup> *White v. Wager*, 25 N. Y. 328; *Winnans v. Peebles*, 32 N. Y. 423; *Dean v. Metropolitan E. Ry. Co.* 119 N. Y. 540, 23 N. E. Rep. 1054; *Graham v. Van Wyck*, 14 Barb. 531.

<sup>2</sup> *White v. Wager*, 25 N. Y. 328, 332, per Denio, J., who further says: "We would not expect to find, in a law passed professedly to shield the property of mar-

ried women from the control of their husbands, a provision making it more easy for the latter to acquire such control. Beyond all doubt, the greatest peril to which the separate estate of the wife is exposed is her disposition to acquiesce in placing the title to it in the hands of her husband. This the common law prevented to a certain extent by rendering her direct conveyance to him void."

<sup>3</sup> Such is the case in **California** : *Rico v. Brandenstein* (Cal.), 33 Pac. Rep. 480, though husband may convey to wife; *Barker v. Koneman*, 13 Cal. 9; *Peck v. Brummagim*, 31 Cal. 441, 89 Am. Dec. 195; *Dow v. Mining Co.* 31 Cal. 629; *Woods v. Whitney*, 42 Cal. 358; *Higgins v. Higgins*, 46 Cal. 259; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. Rep. 869. **Indiana** : *Cook v. Walling*, 117 Ind. 9, 19 N. E. Rep. 532; *Johnson v. Jouchert*, 124 Ind. 105, 24 N. E. Rep. 580; *Luntz v. Greve*, 102 Ind. 173, 26 N. E. Rep. 128; *Kinnaman v. Pyle*, 44 Ind. 275, though deed of husband direct to wife is good; *Thompson v. Mills*, 39 Ind. 528; *Brookbank v. Kennard*, 41 Ind. 339; *Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. Rep. 539. **Maryland** : *Gebb v. Rose*, 40 Md. 387.



43. The common-law disability of husband and wife to convey to each other directly is obviated by the intervention of a third person through whom the conveyance is made. Such a conveyance, if executed in the manner prescribed by law and duly delivered, is valid.<sup>1</sup> Though the deed of a wife conveying her land in this manner to her husband is for his benefit, and is made without any adequate money consideration, it is valid, unless fraud or undue influence on the part of the husband is shown. This is so although the law provides that the husband shall join in a conveyance by his wife of her land, in order that he may protect her from the undue influence of others, and give to her his counsel and advice in relation to the transaction. But while courts of equity are watchful of every such transaction between husband and wife, and will set it aside when it appears that the wife's free will was overcome by undue influence or duress on the part of the husband, it is the settled doctrine that no legal disability attaches to such transaction, but that the wife may in this way convey her property to her husband with the same effect as she may convey to a stranger. When she executes a deed in the manner prescribed by law to a third person, intending that he shall convey to her husband, she has all the protection the law deems essential to her freedom of action and power to convey.<sup>2</sup>

44. The disability of husband and wife to convey, the one to the other, has, however, been expressly removed by statute

Texas: *Bohannon v. Travis* (Tex.), 21 S. W. Rep. 354; *Riley v. Wilson*, 86 Tex. 240, 24 S. W. Rep. 394; *Graham v. Stuve*, 76 Tex. 533, 13 S. W. Rep. 381, where it has long been settled that the husband may convey to his wife directly; *Smith v. Boquet*, 27 Tex. 507; *Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106; *Reynolds v. Lansford*, 16 Tex. 286; *Fitts v. Fitts*, 14 Tex. 443; *Swearingen v. Reed* (Tex.), 21 S. W. Rep. 383. So probably in *Alabama*: *Maxwell v. Grace*, 85 Ala. 577, 5 So. Rep. 319.

<sup>1</sup> *Story* Eq. Jur. § 1395; *Durant v. Ritchie*, 4 Mason, 45; *Hausman v. Burnham*, 59 Conn. 117, 22 Atl. Rep. 1065; *Riley v. Wilson*, 86 Tex. 240, 24 S. W. Rep. 394, per *Stayton*, C. J.; *Thatcher v. Omans*, 3 Pick. 521; *Motte v. Alger*, 15

*Gray*, 322; *Atlantic Nat. Bank v. Taverner*, 130 Mass. 407; *Grove v. Jeager*, 60 Ill. 249; *Gebb v. Rose*, 40 Md. 387; *Scarborough v. Watkins*, 9 B. Mon. 540, 546, 1 Am. Dec. 528; *Todd v. Wickliffe*, 18 B. Mon. 866; *Stevens v. Stevens*, 16 Johns. 109; *Tyler v. Dempsey*, 3 Duer, 73; *McCartee v. Society*, 9 Cow. 437; *Meriam v. Harsen*, 2 Barb. Ch. 232, 4 Edw. Ch. 70; *Garvin v. Ingram*, 10 Rich. 130; *Shepperson v. Shepperson*, 2 Gratt. 501; *Griffin v. Birkhead*, 84 Va. 612, 5 S. E. Rep. 685; *Long v. Croson*, 119 Ind. 3, 21 N. E. Rep. 450; *Wardén v. Lyons*, 118 Pa. St. 396, 12 Atl. Rep. 408; *Townsend v. Maynard*, 45 Pa. St. 198.

<sup>2</sup> *Riley v. Wilson*, 86 Tex. 240, 24 S. W. Rep. 394, per *Stayton*, C. J.

in some States.<sup>1</sup> But even such a statute, declaring in general terms that a conveyance executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons, relates only to property owned absolutely by the husband and wife in their own right, and not to the interest one may have in the lands of the other growing out of the marriage relation. Conveyances between husband and wife intended to relinquish the right of dower or curtesy, or to release any estate or interest growing out of the marriage relation, are void. These estates have their origin in public policy, for they tend to strengthen the marriage relation, and to some extent preserve to the survivor valuable property rights.<sup>2</sup>

### III. *Conveyance between Husband and Wife good in Equity.*

45. In equity, however, a deed from a husband to his wife may be sustained and enforced, especially in case of a voluntary settlement upon her, when the rights of creditors or other third parties are not in any way interfered with.<sup>3</sup> When the fact that

<sup>1</sup> Iowa: R. S. 1888, § 3397; *Linton v. Crosby*, 54 Iowa, 478, 6 N. W. Rep. 726; *Robertson v. Robertson*, 25 Iowa, 350. New York: Laws 1887, ch. 537, 4 R. S. 1889, p. 2606. A deed dated prior to that statute, but delivered after its passage, is valid. *Reynolds v. City Nat. Bank*, 71 Hun, 386, 24 N. Y. Supp. 1134. North Carolina: No contract between husband and wife is valid to affect or change any part of the real estate of the wife unless it be in writing, and, upon a separate examination by the officer, it shall appear that she freely consented thereto, and that the same is not injurious to her. The officer must state the conclusions in his certificate. Code 1883, § 1835; *Sims v. Ray*, 96 N. C. 87. Ohio: A husband or wife may enter into any transaction with the other which either might if unmarried, subject to the general rules which control the actions of persons occupying confidential relations. R. S. 1890, § 3112. Oregon: Hill's Code, § 3871; *Jenkins v. Hall* (Oreg.), 37 Pac. Rep. 62. Washington: G. S. 1891, § 1443.

On the other hand, in Georgia it is ex-

pressly provided that a sale by a married woman of her separate estate to her husband is invalid without the order of the superior court of the county of her domicile. Code, § 1785; *Cain v. Ligon*, 71 Ga. 692, 51 Am. Rep. 281. But there is no restriction as to her making a gift to him. *Cain v. Ligon*, *supra*; *Hood v. Perry*, 75 Ga. 310; *Fulgham v. Pate*, 77 Ga. 454. In Massachusetts it is expressly provided that nothing contained in the statutes in relation to husband and wife shall authorize them to transfer property one to the other. Laws 1884, ch. 132.

<sup>2</sup> *Linton v. Crosby*, 54 Iowa, 478, 6 N. W. Rep. 726; *House v. Fowle*, 20 Oreg. 167, 25 Pac. Rep. 376; *Jenkins v. Hall* (Oreg.), 37 Pac. Rep. 62; *Maclin v. Haywood*, 90 Tenn. 195, 16 S. W. Rep. 140; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200; *Wilber v. Wilber*, 52 Wis. 298, 9 N. W. Rep. 163; *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436.

<sup>3</sup> *Slanning v. Style*, 3 P. Wms. 334; *Freemantle v. Bankes*, 5 Ves. 79; *Arundell v. Phipps*, 10 Ves. 139, 149; *Jones v. Clifton*, 101 U. S. 225; *Moore v. Page*,

such conveyance is intended as a settlement is declared in the instrument, or otherwise clearly established, it will be sustained against the claims of creditors, if it does not deprive them of any existing rights.<sup>1</sup> Any good and meritorious consideration will

111 U. S. 117, 4 S. Ct. 388; Wallingsford v. Allen, 10 Pet. 583; Smith v. Seiberling, 35 Fed. Rep. 677. **Alabama**: McMillan v. Peacock, 57 Ala. 127; Meyer v. Sulzbacher, 75 Ala. 423; Turner v. Kelly, 70 Ala. 85; Washburn v. Gardner, 76 Ala. 597; Powe v. McLeod, 76 Ala. 418; Maxwell v. Grace, 85 Ala. 577, 5 S. W. Rep. 319. **Arkansas**: Ogden v. Ogden (Ark.), 28 S. W. Rep. 796; Dyer v. Bean, 15 Ark. 519. **Colorado**: Craig v. Chandler, 6 Colo. 543. **Connecticut**: Deming v. Williams, 26 Conn. 226, 68 Am. Dec. 386. **Illinois**: Dale v. Lincoln, 62 Ill. 22. **Indiana**: Sims v. Rickets, 35 Ind. 181, 9 Am. Rep. 679; Thompson v. Mills, 39 Ind. 528; Brookbank v. Kennard, 41 Ind. 339. **Kansas**: Ogden v. Walters, 12 Kans. 282. **Kentucky**: Maraman v. Maraman, 4 Met. (Ky.) 84; Bohannon v. Travis, 94 Ky. 59, 21 S. W. Rep. 354. **Maryland**: Bowie v. Stonestreet, 6 Md. 418, 61 Am. Dec. 318. **Massachusetts**: Adams v. Brackett, 5 Met. 280; Phelps v. Phelps, 20 Pick. 556; Bancroft v. Curtis, 108 Mass. 47. **Michigan**: Jordan v. White, 38 Mich. 253; Loomis v. Brush, 36 Mich. 40. **Minnesota**: Wilder v. Brooks, 10 Minn. 50, 88 Am. Dec. 49. **Mississippi**: Wells v. Wells, 35 Miss. 638; Ratcliffe v. Dougherty, 24 Miss. 181; Wells v. Treadwell, 28 Miss. 717; Warren v. Brown, 25 Miss. 66, 57 Am. Dec. 191. **Missouri**: Crawford v. Whitmore, 120 Mo. 144, 25 S. W. Rep. 365; Pitts v. Sheriff, 108 Mo. 110, 18 S. W. Rep. 1071; Small v. Field, 102 Mo. 104; Turner v. Shaw, 96 Mo. 22, 8 S. W. Rep. 897; Wood v. Bradley, 76 Mo. 23, 31, 43 Am. Rep. 754. The cases of Cooper v. Standley, 40 Mo. App. 138, and Bangert v. Bangert, 13 Mo. App. 144, are overruled. **Nebraska**: Smith v. Dean, 15 Neb. 432; Furrow v. Athley, 21 Neb. 671, 33 N. W. Rep. 208, 59 Am. Rep. 867. **New Hampshire**: Chadbourne v. Gilman, 64 N. H. 353; Jewell v. Porter, 31 N. H. 34. **New Jersey**: Vought v. Vought, 50 N. J. Eq. 177, 27 Atl. Rep. 489; Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. Rep. 233. **New York**: Hunt v. Johnson, 44 N. Y. 27, 4 Am. Rep. 631; Townshend v. Townshend, 1 Abb. N. C. 81; Diefendorf v. Diefendorf, 8 N. Y. Supp. 617; Shepard v. Shepard, 7 Johns. Ch. 57, 41 Am. Dec. 396; Simmons v. McElwain, 26 Barb. 419; Tallinger v. Mandeville, 113 N. Y. 432; Dean v. Metropolitan E. Ry. Co. 119 N. Y. 540, 23 N. E. Rep. 1054, per O'Brien, J. The cases of Winans v. Peebles, 32 N. Y. 423, and White v. Wager, 25 N. Y. 328, are explained in later decisions. **North Carolina**: Warlick v. White, 86 N. C. 139, 41 Am. Rep. 453. **Ohio**: Crooks v. Crooks, 34 Ohio St. 610; Fowler v. Trebein, 16 Ohio St. 493, 91 Am. Dec. 95; Huber v. Huber, 10 Ohio, 371. **Oregon**: Miller v. Miller, 17 Oreg. 423, 21 Pac. Rep. 938. **Pennsylvania**: Coates v. Gerlach, 44 Pa. St. 43. **Rhode Island**: Barrows v. Keene, 15 R. I. 484, 486. **South Carolina**: Trustees v. Bryson, 34 S. C. 401, 13 S. E. Rep. 619. **Tennessee**: McCampbell v. McCampbell, 2 Lea, 661, 31 Am. Rep. 623. **Texas**: Story v. Marshall, 24 Tex. 305, 76 Am. Dec. 106. **Vermont**: Cardell v. Ryder, 35 Vt. 47; Barron v. Barron, 24 Vt. 375. **Virginia**: Sayers v. Wall, 26 Gratt. 354, 21 Am. Rep. 303; Jones v. Obenchain, 10 Gratt. 259. **West Virginia**: Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. Rep. 410; McKenzie v. Railroad Co. 27 W. Va. 306. **Wisconsin**: Albright v. Albright, 70 Wis. 528, 36 N. W. Rep. 254; Hannan v. Oxley, 23 Wis. 519; Carpenter v. Tatro, 36 Wis. 297; Putnam v. Bicknell, 18 Wis. 333; Stroebe v. Fehl, 22 Wis. 337; Kinney v. Dexter, 81 Wis. 80.

<sup>1</sup> Moore v. Page, 111 U. S. 117, 4 S. Ct. 388, per Field, J.; Jones v. Clifton,

support such a deed. In equity an inquiry will be made into the motives, consideration, and objects to be accomplished by such conveyance.<sup>1</sup> If the conveyance is from the wife to the husband, there may be a presumption against its validity on account of the confidential relation of husband and wife, and the supposed dominant influence of the husband; but this presumption is overcome by proof that the wife received adequate consideration; that the conveyance was to her advantage, and was not obtained by duress or undue influence.<sup>2</sup> When, however, the conveyance is from a husband to his wife, there is a presumption that it was intended for the wife's support, and is valid in equity, unless it was made in violation of the rights of creditors.<sup>3</sup>

46. A conveyance directly by the husband to the wife creates in the wife a separate estate vesting in her the entire interest, without the use of the technical words necessary to create a separate estate in conveyances to her from persons other than the husband,<sup>4</sup> "since otherwise the transaction, which was meant to have some effect, can have none in law or equity."<sup>5</sup> The separate estate so created is the equitable separate estate, which is limited to the "sole and separate use and benefit" of a married woman. A trustee is ordinarily essential to the existence of this estate. When the conveyance is from a third person to a married woman to hold to her sole and separate use, the law gives to the husband a life interest in the land; "but at the same time equity

101 U. S. 225; *Miller v. Miller*, 17 Oreg. 423, 21 Pac. Rep. 938; *Trustees v. Bryson*, 34 S. C. 401, 13 S. E. Rep. 619.

<sup>1</sup> *Smith v. Seiberling*, 35 Fed. Rep. 677; *Waterman v. Higgins*, 28 Fla. 660, 10 So. Rep. 97; *Dean v. Metropolitan E. Ry. Co.* 119 N. Y. 540, 23 N. E. Rep. 1054; *Diefendorf v. Diefendorf*, 8 N. Y. Supp. 617; *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631; *Albright v. Albright*, 70 Wis. 528, 36 N. W. Rep. 254; *Crooks v. Crooks*, 34 Ohio St. 610; *Wilder v. Brooks*, 10 Minn. 50, 88 Am. Dec. 49; *Furrow v. Athey*, 21 Neb. 671, 33 N. W. Rep. 208, 59 Am. Rep. 867; *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679; *Thompson v. Mills*, 39 Ind. 528; *Wells v. Wells*, 35 Miss. 638; *Chadbourn v. Gilman*, 64 N. H. 353.

<sup>2</sup> *Berkowitz v. Brown*, 3 Misc. Rep. 1,

23 N. Y. Supp. 792; *Farmer v. Farmer*, 39 N. J. Eq. 211.

<sup>3</sup> *Fitzpatrick v. Burchill*, 7 Misc. Rep. 463, 28 N. Y. Supp. 389; *Miller v. Miller*, 17 Oreg. 423, 21 Pac. Rep. 938; *Wilder v. Brooks*, 10 Minn. 50, 55, 88 Am. Dec. 49; *Thompson v. Allen*, 103 Pa. St. 44, 49 Am. Rep. 116, if only a reasonable provision for her; *Coates v. Gerlach*, 44 Pa. St. 43; *Crooks v. Crooks*, 34 Ohio St. 610; *Wood v. Broadley*, 76 Mo. 23, 43 Am. Rep. 754; *Warlick v. White*, 86 N. C. 139, 41 Am. Rep. 453, if a reasonable provision and the wife is not unworthy.

<sup>4</sup> *McMillan v. Peacock*, 57 Ala. 127; *Pitts v. Sheriff*, 108 Mo. 110, 115; *Small v. Field*, 102 Mo. 104; *Turner v. Shaw*, 96 Mo. 22; *Deming v. Williams*, 26 Conn. 226, 68 Am. Dec. 386.

<sup>5</sup> *Bishop on Mar. Women*, § 838.

steps in and charges whatever legal ownership is vested in the husband with the trust to hold for the separate use of the wife."<sup>1</sup> This equitable separate estate is to be distinguished from the separate estate of a married woman created by legislation. This is an estate which without legislation would not have been separate, but subject to the common-law marital rights of the husband; and not an estate which, by the instrument creating it, is freed from those rights, and is a separate estate in contemplation of a court of equity.<sup>2</sup> All that is necessary to create an equitable separate estate is the expression, in the conveyance, of a clear intention to vest in the wife the entire property and interest conveyed. "A conveyance by the husband directly to the wife, without reservation, is necessarily a clear, unequivocal manifestation and declaration of the intention to relinquish his own rights, and to clothe the wife with them, and that intention a court of equity will carry into effect."<sup>3</sup>

47. A deed from the wife to the husband may be valid in equity where a consideration has been paid, or the husband is entitled to equitable relief for improvements made by him upon his wife's land.<sup>4</sup> While at law a conveyance by a husband to his wife is equally void as a conveyance by a wife to her husband, they do not necessarily stand upon the same basis in equity. It is the duty of the husband to provide an assured support for his wife, but no such duty rests upon the wife to provide for her husband; and therefore his deed might be sustained in equity as a settlement, while her deed would be invalid for want of a consideration.

<sup>1</sup> Bishop on Mar. Women, § 800.

<sup>4</sup> *Winans v. Peebles*, 32 N. Y. 423;

<sup>2</sup> *McMillan v. Peacock*, 57 Ala. 127.

*Brooks v. Kearns*, 86 Ill. 547.

<sup>3</sup> *McMillan v. Peacock*, 57 Ala. 127,  
130, per Bricknell, C. J.

## CHAPTER III.

### DISABILITY OF INSANE PERSONS.

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| <p>I. Presumption and proof regarding insanity, 48-51.</p> <p>II. Deed of insane person under guardianship void, 52-54.</p> <p>III. Burden of proof where there is no guardianship, 55-58.</p> | <p>IV. Confirmation and disaffirmance of deed of insane grantor, 59-66.</p> <p>V. Restoring consideration on disaffirmance, 67-69.</p> <p>VI. Title of purchaser in good faith, 70-73.</p> |
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#### I. *Presumption and Proof regarding Insanity.*

48. Sanity is presumed until insanity is proved.<sup>1</sup> It is difficult to fix the exact line where sanity ends and insanity begins. The common law has not drawn any discriminating line.<sup>2</sup> It may be said in general that a person has a legal capacity to contract when he is in the possession of mental capacity sufficient to transact his business with intelligence.<sup>3</sup> It is not requisite, however, that he should be able to manage his business with judg-

<sup>1</sup> *Jones v. Jones*, 137 N. Y. 610, 33 N. E. Rep. 479, affirming 17 N. Y. Supp. 479; *Jackson v. King*, 4 Cow. 207, 15 Am. Dec. 354; *Argo v. Coffin*, 142 Ill. 368, 32 N. E. Rep. 679; *Myatt v. Walker*, 44 Ill. 485; *Menkins v. Lightner*, 18 Ill. 282; *Guild v. Hull*, 127 Ill. 523, 20 N. E. Rep. 665; *Titcomb v. Vantyle*, 84 Ill. 371; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383; *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146; *Perkins v. Perkins*, 39 N. H. 163; *Dennett v. Dennett*, 44 N. H. 531, 539, 84 Am. Dec. 97.

27 Cal. 376; *Seerley v. Sater*, 68 Iowa, 375, 27 N. W. Rep. 262; *Marshall v. Marshall*, 75 Iowa, 132, 39 N. W. Rep. 230; *Cocke v. Montgomery*, 75 Iowa, 259, 39 N. W. Rep. 386; *Stewart v. Lisenard*, 26 Wend. 255; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Valentine v. Lunt*, 51 Hun, 544, 3 N. Y. Supp. 906; *Van Deusen v. Swift*, 51 N. Y. 378; *Searle v. Galbrath*, 73 Ill. 269; *De Witt v. Mattison*, 26 Neb. 655, 42 N. W. Rep. 742; *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. Rep. 228.

<sup>2</sup> *Jackson v. King*, 4 Cow. 207, 218, 15 Am. Dec. 354, per Woodworth, J.

<sup>3</sup> *Creagh v. Blood*, 2 Jones & Lat. 509; *Ex parte Barnsby*, 3 Atk. 168, per Lord Hardwicke; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266; *Darby v. Hayford*, 56 Me. 246; *Moffit v. Witherspoon*, 10 Ired. 185; *Crowther v. Rowlandson*, In *Crowther v. Rowlandson*, *supra*, a conveyance was set aside upon proof that the grantor was not capable of taking rational care of his property by reason of a mental delusion; *Sanderson, C. J.*, dissenting on the ground that the grantor did some sane acts at the time of the conveyance.

ment and discernment, or in a proper and prudent manner; for many sane men cannot do this. A man is of unsound mind, and disqualified to enter into a contract, when he is without an intelligent understanding of what he is doing, — when he is without what in the old phraseology was termed “discourse of reason.” In other words, unsoundness of mind imports an entire want of intelligent understanding, not a mere weakness of understanding.<sup>1</sup>

In general terms it may be said that, to make a valid deed, the grantor’s mental capacity must be such as to enable him in a reasonable manner to understand the nature and effect of the deed, and to comprehend the transaction of which the deed is a part.<sup>2</sup> He must have a mind capable of assent to the act.<sup>3</sup> He is not capable of assent if he has no mind, or his mind is unsound, or he is not able to exercise it by reason of duress, coercion, threats, compulsion, or any undue influence.<sup>4</sup>

One seeking to set aside a deed on the ground of insanity must show that the grantor had not mind enough to comprehend, in a reasonable manner, the nature and effect of what he was doing.<sup>5</sup> “Before a complainant can claim a decree, in the absence of undue influence, he must show such a degree of mental weakness as renders a party incapable of understanding and protecting his

<sup>1</sup> *Farnam v. Brooks*, 9 Pick. 212; *Van Alst v. Hunter*, 5 Johns. Ch. 148; *Aiman v. Stout*, 42 Pa. St. 114; *Cain v. Warfield*, 33 Md. 23; *Maddox v. Simmons*, 31 Ga. 512, 528; *Miller v. Craig*, 36 Ill. 109; *Taylor v. Patrick*, 1 Bibb, 168; *McDaniel v. McCoy*, 68 Mich. 332, 36 N. W. Rep. 84; *Dickson v. Kempinsky*, 96 Mo. 252, 9 S. W. Rep. 618; *Warfield v. Warfield*, 76 Iowa, 633, 41 N. W. Rep. 383; *Clark v. Kirkpatrick* (N. J. Eq.), 16 Atl. Rep. 309.

<sup>2</sup> *Stewart v. Flint*, 59 Vt. 144, 8 Atl. Rep. 801; *Day v. Seely*, 17 Vt. 542; *Hovey v. Hobson*, 55 Me. 256; *Jones v. Jones*, 17 N. Y. Supp. 905, affirmed 137 N. Y. 610, 33 N. E. Rep. 479; *Lozear v. Shields*, 23 N. J. Eq. 509; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Dicken v. Johnson*, 7 Ga. 484; *Carpenter v. Carpenter*, 8 Bush, 283; *McElwain v. Russell* (Ky.), 12 S. W. Rep. 777; *Sabledowsky v. Arbuckle*, 50 Minn. 475, 52 N. W. Rep. 920.

<sup>3</sup> *Cole v. Cole*, 21 Neb. 84, 31 N. W. Rep. 493. In this case a man past seventy years of age, afflicted with senile cerebral atrophy to such an extent that his mind and memory were so impaired that he often did not know his own sons with whom he resided, and often became lost in his own house, dooryard, and orchard, made a voluntary deed of a valuable farm, his only property, to the children of his last wife, which was set aside upon the application of the children of a former wife.

<sup>4</sup> *Van Dusen v. Sweet*, 51 N. Y. 378; *Clark v. Kirkpatrick* (N. J. Eq.), 16 Atl. Rep. 309.

<sup>5</sup> *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Stewart v. Flint*, 59 Vt. 144, 8 Atl. Rep. 801; *Guest v. Beeson*, 2 Houst. 246; *Jones v. Thompson*, 5 Del. Ch. 374; *Crowther v. Rowlandson*, 27 Cal. 376; *Worthington v. Campbell* (Ky.), 1 S. W. Rep. 714.

own interests. The circumstance that the intellectual powers have been somewhat impaired by age is not sufficient, if the contracting party still retains a full comprehension of the meaning, design, and effects of his acts."<sup>1</sup> Upon this issue, evidence of the grantor's business transactions at or about the time of making the deed, and of his declarations, oral or written, tending to show his comprehension or want of comprehension of daily occurrences in his business, is admissible.<sup>2</sup>

**49. Weakness of understanding does not of itself incapacitate one to make a valid contract.** It is only when a grantor has not strength of mind sufficient to understand the nature and consequence of his act in giving a deed that this can be avoided on the ground of insanity.<sup>3</sup> If his mind is so impaired that his memory cannot recall the necessary facts, and his judgment form correct conclusions, his power of disposing of his property is gone; but, to have the effect of depriving him of this power of

<sup>1</sup> *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489. And see *Kimball v. Cuddy*, 117 Ill. 213, 7 N. E. Rep. 589; *Argo v. Coffin*, 142 Ill. 368, 32 N. E. Rep. 679; *Elcessor v. Elcessor*, 146 Pa. St. 359, 23 Atl. Rep. 230.

<sup>2</sup> *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. Rep. 894.

<sup>3</sup> *Creagh v. Blood*, 2 Jones & Lat. 509. **Alabama**: *In re Carmichael*, 36 Ala. 514. **Connecticut**: *Hale v. Hills*, 8 Conn. 39. **Delaware**: *Jones v. Thompson*, 5 Del. Ch. 374. **Illinois**: *Miller v. Craig*, 36 Ill. 109; *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489; *Baldwin v. Dunton*, 40 Ill. 188; *Stone v. Wilbern*, 83 Ill. 105; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. Rep. 622. **Indiana**: *Somers v. Pumphrey*, 24 Ind. 231. **Iowa**: *Marmon v. Marmon*, 47 Iowa, 121; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431. **Kentucky**: *Speers v. Sewell*, 4 Bush, 239. **Maine**: *Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266; *Hovey v. Hobson*, 55 Me. 256; *Darby v. Hayford*, 56 Me. 246. **Maryland**: *Greenwade v. Greenwade*, 43 Md. 313. **Massachusetts**: *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. Rep. 735. **Michigan**: *Sponable v. Hanson*, 87 Mich. 204, 49 N. W. Rep.

644; *Leonardson v. Kulin*, 64 Mich. 1, 31 N. W. Rep. 26. **Nebraska**: *Johnson v. Phifer*, 6 Neb. 401; *Mulloy v. Ingalls*, 4 Neb. 115; *Cole v. Cole*, 21 Neb. 84, 31 N. W. Rep. 493. **New Hampshire**: *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97. **New Jersey**: *Blakeley v. Blakeley*, 33 N. J. Eq. 502. **New York**: *Jackson v. King*, 4 Cow. 207, 15 Am. Dec. 354; *Sprague v. Duel*, *Clarke*, 90; *Jones v. Hughes*, 15 Abb. N. C. 141; *Davis v. Culver*, 13 How. Pr. 62; *Odell v. Buck*, 21 Wend. 142; *Sprague v. Duel*, 11 Paige, 480; *Van Deusen v. Sweet*, 51 N. Y. 378. **North Carolina**: *Goodman v. Sapp*, 102 N. C. 477, 9 S. E. Rep. 483. **Pennsylvania**: *Aiman v. Stout*, 42 Pa. St. 114. **Rhode Island**: *Anthony v. Hutchins*, 10 R. I. 165. **Texas**: *Beville v. Jones*, 74 Tex. 148, 11 S. W. Rep. 1128. **Vermont**: *King v. Cummings*, 60 Vt. 502, 11 Atl. Rep. 727. **Virginia**: *Beverley v. Walden*, 20 Gratt. 147. **West Virginia**: *Whittaker v. Southwestern Va. Imp. Co.* 34 W. Va. 217, 224, 12 S. E. Rep. 507. **Wisconsin**: *Wright v. Jackson*, 59 Wis. 569, 18 N. W. Rep. 486; *Henderson v. McGregor*, 30 Wis. 78.



disposal, the evidence must show that his mind is so far impaired that he cannot transact business in a rational manner.

Old age alone is no proof of incapacity to execute a deed.<sup>1</sup> Thus a deed will not be set aside on the mere evidence that the grantor was ninety-two years old, and was afflicted with the usual bodily infirmities of a man of his age.<sup>2</sup> Mere difficulty of speech, following an attack of paralysis, is no evidence of mental condition.<sup>3</sup>

50. The deed of a monomaniac cannot be avoided on the ground of the monomania, unless he was incapacitated from exercising his judgment in the transaction.<sup>4</sup> Thus, one who is a monomaniac on the subject of religion may be wholly competent to transact general business and to execute a deed. The question in such case is, has the transaction been affected by the grantor's mania? Proof that his mind was in a morbid condition on a subject wholly disconnected with the transaction is irrelevant.<sup>5</sup> But proof of a specific monomania which might influence him in regard to a particular conveyance,<sup>6</sup> or an insane delusion that the world was about to come to an end, which rendered him wholly indifferent about property, will invalidate his conveyance executed while subject to such delusion.<sup>7</sup>

51. A person deaf and dumb from his birth is not for that reason legally incapacitated from executing a deed; but the deed

<sup>1</sup> *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383; *Kerr v. Lunnsford*, 31 W. Va. 659, 8 S. E. Rep. 493; *Greer v. Greer*, 9 Gratt. 330; *Jarrett v. Jarrett*, 11 W. Va. 584; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. Rep. 622; *Walton v. Northington*, 5 Sneed, 282.

<sup>2</sup> *Paine v. Aldrich*, 14 N. Y. Supp. 538, affirmed 133 N. Y. 544, 30 N. E. Rep. 723.

<sup>3</sup> *Doran v. McConlogue*, 150 Pa. St. 98, 24 Atl. Rep. 357.

<sup>4</sup> *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Burgess v. Pollock*, 53 Iowa, 273, 5 N. W. Rep. 179, 36 Am. Rep. 218; *Hovey v. Hobson*, 55 Me. 256; *Ekin v. McCracken*, 11 Phila. 534, 32 Leg. Int. 405.

<sup>5</sup> *Creagh v. Blood*, 2 Jones & Lat. 509; *Campbell v. Hill*, 22 U. C. C. P. 526, 23 U. C. C. P. 473; *Blakeley v. Blakeley*, 33

N. J. Eq. 502; *Lozeau v. Shields*, 23 N. J. Eq. 509; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Alston v. Boyd*, 6 Humph. 504.

<sup>6</sup> *Lemon v. Jenkins*, 48 Ga. 313.

<sup>7</sup> *Bond v. Bond*, 7 Allen, 18, per Bigelow, C. J.: "If it appeared that she was affected with mental disease, which had culminated in a delusion that she and those who would inherit her property, or for whose pecuniary interest and welfare she would in the exercise of her reason have provided, were about to perish, and that thereby she was rendered indifferent to property, and incapable of appreciating its uses and value, and had become reckless of or insensible to her own interests, or the interests of those dependent upon her or connected with her, she certainly was not competent to make a valid disposition of her property by deed."

of such a person is good if he in fact had an understanding and capacity sufficient to enable him to make such conveyance.<sup>1</sup>

## II. *Deed of Insane Person under Guardianship void.*

52. The deed of an insane man under guardianship is absolutely void. The guardianship is conclusive respecting the ward's disability, whatever may have been the cause of his insanity.<sup>2</sup> The assent of the guardian of such ward to the deed of the latter confers no element of validity upon that instrument. Where a guardian has been appointed of a person, in consequence of an inquisition that has found him to be of unsound mind and incapable of managing his own affairs, the decree is notice to all the world of his incapacity to contract, and this incapacity is presumed to continue so long as the guardianship continues.<sup>3</sup> His contract while under guardianship cannot be supported by evidence of his recovery or of a lucid interval.

A decree of a surrogate that a testator was of unsound mind, and incapable of executing a will at the time of its execution, is *prima facie* but not conclusive evidence of the invalidity of a deed executed by the decedent on the same day as the will.<sup>4</sup>

But proceedings under a statute, authorizing a judge or other officer to commit a person to a hospital or an insane asylum for care and treatment, are not evidence of mental incapacity to make

<sup>1</sup> *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187. "If, superadded to the deprivation of the two senses before mentioned, the grantor had been blind, he would be considered in law as incapable of any understanding, being deficient in those inlets which furnish the human mind with ideas." Per Hosmer, C. J. *Barnett v. Barnett*, 1 Jones Eq. 221; *Brower v. Fisher*, 4 Johns. Ch. 441.

<sup>2</sup> *Connecticut*: *Griswold v. Butler*, 3 Conn. 227. *Indiana*: *Copenrath v. Kienby*, 83 Ind. 18. *Kansas*: *New England L. & T. Co. v. Spidler* (Kans.), 38 Pac. Rep. 799. *Kentucky*: *Pearl v. McDowell*, 3 J. J. Marsh. 658, 20 Am. Dec. 199. *Maine*: *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705. *Massachusetts*: *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Leonard v. Leonard*, 14 Pick.

280; *White v. Palmer*, 4 Mass. 147. *Missouri*: *Rannells v. Gerner*, 80 Mo. 474. *New York*: *Fitzhugh v. Wilcox*, 12 Barb. 235; *Brown v. Miles*, 61 Hun, 453, 16 N. Y. Supp. 251; *Griswold v. Miller*, 15 Barb. 520; *Wadsworth v. Sherman*, 14 Barb. 169; *Van Deusen v. Sweet*, 51 N. Y. 378. *Pennsylvania*: *Imhoff v. Witmer*, 31 Pa. St. 243; *Klohs v. Klohs*, 61 Pa. St. 245; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470. *Texas*: *Elston v. Jasper*, 45 Tex. 409; *Grimes v. Shaw* (Tex.), 21 S. W. Rep. 718. *Wisconsin*: *Mohr v. Tulip*, 40 Wis. 66.

<sup>3</sup> *Imhoff v. Witmer*, 31 Pa. St. 243; *Rannells v. Gerner*, 80 Mo. 474. And see *Thomas v. Hatch*, 3 Sumn. 170.

<sup>4</sup> *Baxter v. Baxter*, 76 Hun, 98, 27 N. Y. Supp. 834.

contracts on the part of the person committed to the hospital or asylum. The proceedings are quite different from those which authorize the appointment of a guardian of an insane person. The statutory proceedings for this purpose are not materially different from those on the writ *de lunatico inquirendo* at common law, except that the hearing is before the court, instead of before commissioners with a jury. Such proceedings, followed by a finding of insanity and the appointment of a guardian, are evidence of the ward's insanity in any transaction and in collateral proceedings.<sup>1</sup>

Whether the owner of land is capable of executing a deed, or should have a guardian appointed, may also be determined in equity upon the appointment of a commission *de lunatico inquirendo*.<sup>2</sup> The court has jurisdiction to issue a commission, either in case the alleged lunatic is a resident of the State or is the owner of property in the State, though a non-resident.<sup>3</sup>

53. An adjudication of insanity made after the execution of a conveyance is not conclusive but only presumptive evidence of incapacity. Even when, after the execution of the deed, the grantor is found upon an inquisition to have been of unsound mind from a time prior to the execution of the deed, such inquisition and finding are presumptive but not conclusive evidence of the grantor's incapacity to execute the deed.<sup>4</sup> If the transaction was a fair one, for a full consideration and without notice of the lunacy to the purchaser, the deed will not be set aside merely on the ground that the time of the execution of the deed is overreached by the inquisition of lunacy.<sup>5</sup>

If the guardianship has been practically abandoned without judicial action, and the grantor is in fact of sound mind at the time of executing the deed, this will not be conclusively presumed

<sup>1</sup> *Knox v. Haug*, 48 Minn. 58, 50 N. W. Rep. 934.

<sup>2</sup> *In re Farrell* (N. J. Ch.), 27 Atl. Rep. 813.

<sup>3</sup> *Ex parte Southcote*, 1 Amb. 109, 2 Ves. Sr. 401; *In re Duchess of Chandois*, 1 Schoales & L. 301; *In re Houstoun*, 1 Russ. 312; *In re Perkins*, 2 Johns. Ch. 124; *In re Fowler*, 2 Barb. Ch. 305; *In re Child*, 16 N. J. Eq. 498; *In re Devansney* (N. J. Eq.), 28 Atl. Rep. 459.

<sup>4</sup> *Snooks v. Watts*, 11 Beav. 105; *Jacobs v. Richards*, 18 Beav. 300; *Frank v.*

*Mainwaring*, 2 Beav. 115; *Niell v. Morley*, 9 Ves. 478; *Van Deusen v. Sweet*, 51 N. Y. 378; *In re Christie*, 5 Paige, 242; *L'Amoureux v. Crosby*, 2 Paige, 422, 427, 22 Am. Dec. 655; *Osterhout v. Shoemaker*, 3 Hill (N. Y.), 513; *Hirsch v. Trainer*, 3 Abb. N. C. 274; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Hunt v. Hunt*, 13 N. J. Eq. 161; *Miskey's App.* 107 Pa. St. 611; *McGinnis v. Commonwealth*, 74 Pa. St. 245; *Klohs v. Klohs*, 61 Pa. St. 245; *Arnold v. Townsend*, 14 Phila. 216.

<sup>5</sup> *Yauger v. Skinner*, 14 N. J. Eq. 389.

to be void. The burden in such case, of proving the termination of the guardianship and the actual restoration of the lunatic, is upon the party relying upon the deed.<sup>1</sup>

54. But the deed of an insane man, before he is adjudged insane and put under guardianship, is not void but voidable, and may be confirmed or avoided by him when he afterwards becomes sane, or by his heirs.<sup>2</sup> By force of statutory provisions in exceptional cases, the insanity of a grantor may render a deed void and not merely voidable. Thus, under a statute which provides that the husband must join in a deed made by his wife to convey her land, if her husband joins in such deed while insane,

<sup>1</sup> *Elston v. Jasper*, 45 Tex. 409; *Mohr v. Tulip*, 40 Wis. 66.

<sup>2</sup> *Thompson v. Leach*, 3 Mod. 296, 2 Kent Com. 451; *Tucker v. Moreland*, 10 Pet. 58; *Thomas v. Hatch*, 3 Sumn. 170. *Illinois*: *Scanlan v. Cobb*, 85 Ill. 296; *Burnham v. Kidwell*, 113 Ill. 425. *Indiana*: *Freed v. Brown*, 55 Ind. 310; *Nichol v. Thomas*, 53 Ind. 42; *Schuff v. Ransom*, 79 Ind. 458; *Musselman v. Cravens*, 47 Ind. 1; *Crouse v. Holman*, 19 Ind. 30; *Somers v. Pumphrey*, 24 Ind. 231; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Copenrath v. Kienby*, 83 Ind. 18; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. Rep. 249; *Northwestern L. Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 317. *Kansas*: *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. Rep. 584. *Kentucky*: *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71; *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413. *Maine*: *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514. *Massachusetts*: *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *Allis v. Billings*, 6 Metc. 415, 39 Am. Dec. 744; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414. *Maryland*: *Evans v. Horan*, 52 Md. 602; *Key v. Davis*, 1 Md. 32; *Chew v. Bank*, 14 Md. 299. *New Hampshire*: *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592. *New Jersey*: *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Yauger v. Skinner*, 14 N. J. Eq. 389. *New York*: *Ingraham v. Baldwin*, 9 N. Y. 45; *Jackson v. Gumaer*, 2 Cow. 552. In *Van Densen v. Sweet*, 51 N. Y. 378, it is broadly stated that such a deed is void; but in that case the deed was executed at a time when the grantor, as afterwards adjudged, was insane, and therefore the case is an authority only that the deed of an insane person, made at a time when he was a lunatic as afterwards adjudged, is absolutely void. *Brown v. Miles*, 61 Hun, 453, 16 N. Y. Supp. 251, is a similar case. See, also, *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541. *North Carolina*: *Odum v. Riddick*, 104 N. C. 515, 10 S. E. Rep. 609; *Rigzan v. Green*, 80 N. C. 236, 30 Am. Rep. 77. *Pennsylvania*: *Snowden v. Dunlavey*, 11 Pa. St. 522; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766. *Texas*: *Elston v. Jasper*, 45 Tex. 409; *Pearson v. Cox*, 71 Tex. 246, 9 S. W. Rep. 124.

There are a few decisions to the effect that the deed of an insane person is absolutely void, and not merely voidable, though he had not been adjudged insane. *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. Rep. 175, *Elliot*, J., dissenting; *Goodyear v. Adams*, 5 N. Y. Supp. 275, affirmed 119 N. Y. 650, 23 N. E. Rep. 1149; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. Rep. 512.

the deed is void to the same extent that it would have been had the husband not joined in it. If the deed of the wife alone would be void, her deed, with the assent of her husband when he was incapable of giving assent, is also void. His subsequent assent to the deed, or his ratification of it, would not fulfil the requirements of the statute, or give validity to the deed of the wife.<sup>1</sup>

The deed of an insane person not under guardianship is binding until it is disaffirmed;<sup>2</sup> and it can be disaffirmed only by the grantor or his heirs or devisees.

### III. *Burden of Proof where there is no Guardianship.*

55. The burden of proof that the execution of a deed was procured while the grantor was of unsound mind is upon the party who alleges the insanity.<sup>3</sup> This is the rule in case a prior continuous mental incapacity has not been shown. In case his incapacity has been only occasional and temporary, and his deed is not lacking in consideration, and was not obtained by fraud or other unfairness, and the act was reasonable and natural, the burden of proving incapacity at the time of the conveyance is on the party claiming that the deed is invalid.<sup>4</sup> If in any case the evidence in regard to the grantor's mental condition is conflicting, the fact that the transaction is unnatural and unreasonable may be decisive of the question of capacity.<sup>5</sup> Insanity, like any other fact, must be proved. It is a question for the jury.<sup>6</sup> Neighborhood reports or rumors are wholly inadmissible in evidence.<sup>7</sup> Such evidence, being inadmissible to prove the fact, is inadmissible to prove that a subsequent purchaser in good faith had notice of

<sup>1</sup> Leggate v. Clark, 111 Mass. 308. And see Elliot v. Ince, 7 De G., M. & G. 475. Now, in Massachusetts, a married woman may convey her land in the same manner as if she were sole, only that the husband cannot be deprived of his estate by the curtesy without his consent. Pub. Stats. ch. 147, § 1.

<sup>2</sup> Howe v. Howe, 99 Mass. 88.

<sup>3</sup> Howe v. Howe, 99 Mass. 88; Kennedy v. Marrast, 46 Ala. 161, 168; Elcessor v. Elcessor, 146 Pa. St. 359, 23 Atl. Rep. 230.

<sup>4</sup> Stewart v. Flint, 59 Vt. 144, 8 Atl. Rep. 801.

<sup>5</sup> Bressey v. Gross (Ky.), 7 S. W. Rep. 150.

<sup>6</sup> Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Hoobler v. Hoobler 128 Ill. 645, 21 N. E. Rep. 571; West v. Douglass, 145 Ill. 164, 34 N. E. Rep. 141.

<sup>7</sup> Ashcraft v. De Armond, 44 Iowa, 229; Myers v. Knabe, 51 Kans. 720, 33 Pac. Rep. 602. The findings of a master as to the mental condition of a grantor, confirmed by the court below, are to be treated as if established by the verdict of a jury, and not to be disregarded except for a plain mistake. Doran v. McConlogue, 150 Pa. St. 98, 24 Atl. Rep. 357.

BURDEN OF PROOF WHERE THERE IS NO GUARDIANSHIP. [§ 56.]

such fact.<sup>1</sup> But a witness, though not an expert, who has had an opportunity to form an opinion as to the grantor's capacity to transact business from a knowledge of his acts, may give in evidence his opinion, based on these facts, of the grantor's mental capacity.<sup>2</sup> The witness should, however, in the first place testify to specific facts showing mental unsoundness on the part of the grantor before giving any opinion in regard to his mental unsoundness.<sup>3</sup>

56. The question of insanity is one that relates to the time of making the deed,<sup>4</sup> though, if a person has been placed under guardianship as one *non compos mentis*, so long as the guardianship continues it is presumed that he remains in that condition, and that his deed made while under guardianship is void. But the fact that a guardian was appointed of a grantor nearly a year after the execution of his deed is not admissible evidence that he was insane at the time of making the deed.<sup>5</sup> To establish the fact that the grantor was of unsound mind at the time he executed the deed, it is not necessary to show that he had, either before or after that time, on an inquisition been found to be insane and placed under guardianship.<sup>6</sup> If no guardian has been appointed, and it is shown that the grantor has been insane at intervals, the grantee can establish the validity of the deed only by clear and satisfactory evidence that it was executed by the grantor during a lucid interval.<sup>7</sup>

Evidence of the grantor's insanity at a time either prior or subsequent to the execution of the deed is admissible as tending to prove his insanity at the time of its execution, provided the matters offered in evidence are not too remote from that time, and are connected by other evidence with the time of the execution of the deed.<sup>8</sup>

<sup>1</sup> Greenslade v. Dare, 20 Beav. 284.

<sup>2</sup> Connecticut Mut. L. Ins. Co. v. Lathrop, 111 U.S. 612, 4 Sup. Ct. Rep. 533; Woodcock v. Johnson, 36 Minn. 217, 30 N. W. Rep. 894; Pinney's Will, 27 Minn. 280, 6 N. W. Rep. 791, 7 N. W. Rep. 144; Fishburne v. Ferguson, 84 Va. 87, 4 S. E. Rep. 575.

<sup>3</sup> Doran v. McConlogue, 150 Pa. St. 98, 24 Atl. Rep. 357.

<sup>4</sup> Ekin v. McCracken, 11 Phila. 534; Hovey v. Chase, 52 Me. 304, 83 Am. Dec.

514; Nichol v. Thomas, 53 Ind. 42; O'Neill v. Nolan, 21 N. Y. Supp. 222, 66 Hun, 631.

<sup>5</sup> Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514.

<sup>6</sup> Freed v. Brown, 55 Ind. 310.

<sup>7</sup> Ripley v. Babcock, 13 Wis. 425.

<sup>8</sup> Nichol v. Thomas, 53 Ind. 42; Wilkinson v. Pearson, 23 Pa. St. 117; Ashcraft v. De Armond, 44 Iowa, 229; Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Hendrix v. Money, 1 Bush, 306;

A deed will not be set aside on account of the mental unsoundness of the grantor upon evidence of such unsoundness so great, six months after the execution of the deed, as to incapacitate him to transact any business, when there is no direct evidence as to his condition at the time of the execution of the deed, and all the evidence shows that his malady was of a progressive nature, and that it was not until three months after executing the deed that it became so serious as to incapacitate him.<sup>1</sup>

If a mortgagor was of sufficient mental capacity at the time of executing the mortgage, his subsequent insanity does not affect the remedy by foreclosure, or suspend a power of sale contained in the mortgage.<sup>2</sup> And so the insanity of a purchaser of the equity of redemption does not invalidate a sale under a deed of trust to which the property was subject.<sup>3</sup>

57. Because a person has been insane at some period of his life, it does not follow that he remains insane, and cannot afterwards make a valid contract. His insanity may have been temporary. It may have been the result of a violent disease which affected his mental faculties only so long as the disease itself lasted. Therefore, to avoid a deed on the ground of the grantor's insanity, proof of insanity at an earlier period is not effectual unless accompanied by proof that the insanity continued to a point of time which bears directly upon the execution of the deed in question.<sup>4</sup>

On the other hand, a decree of a probate court dismissing a petition for the appointment of a guardian of a person alleged to be insane, and, on appeal from such decree, a verdict of a jury and a judgment of a supreme court in favor of his sanity are not conclusive evidence of his sanity at a time intermediate between such decree and verdict, in an action to set aside a deed made by him between such dates; but such decree and verdict are admissible in evidence tending to prove his sanity.<sup>5</sup>

Worthington v. Campbell (Ky.), 1 S. W. E. Rep. 753; Vanmeter v. Darrah, 115 Rep. 714; Jerry v. Townshend, 9 Md. Mo. 153, 22 S. W. Rep. 30; Meyer v. 145; Harden v. Hays, 14 Pa. St. 91; Watson v. Anderson, 11 Ala. 43. Kuechler, 10 Mo. App. 371; Bevin v. Powell, 83 Mo. 365, 11 Mo. App. 216.

<sup>1</sup> Hasbrouck v. Young, 61 Hun, 626, 15 N. Y. Supp. 919. And see O'Neill v. W. Rep. 642.

Nolan, 21 N. Y. Supp. 222, 66 Hun, 631; <sup>4</sup> Turner v. Rusk, 53 Md. 65.  
West v. Douglass, 145 Ill. 164, 34 N. E. <sup>5</sup> Gibson v. Soper, 6 Gray, 279, 66 Am. Rep. 141. Dec. 414.

<sup>2</sup> Laughlin v. Hibben, 129 Ind. 5, 27 N.

58. There is a presumption of the continuance of insanity where this is apparently confirmed, and does not result from a temporary or transient cause; and therefore, when such insanity is shown, it will be presumed to continue, unless subsequent sanity is shown.<sup>1</sup> But a return of sanity may be proved by evidence sufficient to overcome the presumption of continued insanity; and, though the person may again become insane, his deed executed during the lucid interval is good.<sup>2</sup> The burden of showing a lucid interval or a return of sanity is upon the purchaser, or party who claims the validity of the deed.<sup>3</sup>

#### IV. *Confirmation and Disaffirmance of Deed of Insane Grantor.*

59. A confirmation by the grantor must be his intelligent act. Such act to be effectual must be done by the grantor after his restoration to sanity, with such knowledge of the fact as to make his acts binding. It has been asserted that the act of confirmation must be done with a knowledge of the voidable character of the deed and with the intention to confirm it.<sup>4</sup> But this is too rigid a rule. The law assumes that every sane man knowing the facts is bound by his acts and contracts, and will not allow him to excuse himself from ordinary liability on the ground of his ignorance of the law. Therefore, if the grantor, being in his right mind, receives consideration for the conveyance, his intention to ratify and confirm his deed may be inferred; and it is immaterial that at the time of receiving such payment he did not actually know that he had the right to avoid the deed, and that

<sup>1</sup> *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. Rep. 167; *Crouse v. Holman*, 19 Ind. 30; *Wade v. State*, 37 Ind. 180; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Curtis v. Brownell*, 42 Mich. 165, 3 N. W. Rep. 936; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *State v. Wilner*, 40 Wis. 304; *Ricketts v. Jolliff*, 62 Miss. 440; *Clark v. Kirkpatrick* (N. J. Eq.), 16 Atl. Rep. 309, 314.

A deed made by an insane person and his wife, after he has been duly adjudged insane and placed under guardianship, while he is out on a temporary leave of absence, after having been confined in the insane asylum, is void, and conveys no

title to the purchaser. *New England L. & T. Co. v. Spittler* (Kans.), 38 Pac. Rep. 799.

<sup>2</sup> *Towart v. Sellers*, 5 Dow, 231; *Hall v. Warren*, 9 Ves. 605; *Selby v. Jackson*, 6 Beav. 192; *Essex v. Daniell*, L. R. 10 C. P. 543; *Cropp v. Cropp*, 88 Va. 753, 14 S. E. Rep. 529.

<sup>3</sup> *Titcomb v. Vantyle*, 84 Ill. 371; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *Ricketts v. Jolliff*, 62 Miss. 440; *Curtis v. Brownell*, 42 Mich. 165, 3 N. W. Rep. 936; *Fishburne v. Furguson*, 84 Va. 87, 4 S. E. Rep. 575.

<sup>4</sup> *Tucker v. Moreland*, 10 Pet. 58; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716.



he relinquished this right by receiving payment. This is an ignorance of the law which he cannot set up.<sup>1</sup>

60. The deed may be confirmed by the grantor after his restoration to sanity in various ways. It may be by a new deed, by contract, by his acts in relation to the conveyance, or by his failure to act.<sup>2</sup> Any distinct and decisive act of recognition of the deed as valid is competent evidence of ratification. A new deed or a new delivery of the old deed is not requisite, as would be the case if that deed were void.<sup>3</sup>

A grantor may ratify his deed after his restoration to sanity by receiving and accepting the consideration, or any part of it; as, for instance, by receiving support from the grantee. Of course such ratification must be the intelligent act of the grantor, knowing that he was receiving such support under the provisions of the deed, and intending to avail himself of such provisions.<sup>4</sup> If the grantor has taken notes for the purchase-money, his intention to ratify the conveyance will be inferred from his receiving payment of such notes, or any of them, after being restored to his right mind.<sup>5</sup>

61. The deed of an insane man not under guardianship may be confirmed by him during a lucid interval, if he is then in condition to well understand the nature of the instrument and the transaction which led to its execution.<sup>6</sup> The acts of confirmation must show that the grantor intended to confirm the deed.<sup>7</sup>

62. The guardian or committee of an insane person has no power, by his own affirmative acts or by his acts of omission, to ratify the deed of his ward. He cannot dispose of his ward's lands except by proceedings required by statute. The guardian cannot, without the direction of court, do that which his ward was powerless to do before coming of age, or before restoration to reason. The guardian cannot without express authority affirm

<sup>1</sup> *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Jones v. Evans*, 7 Dana, 96.

<sup>2</sup> *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Tucker v. Moreland*, 10 Pet. 58; *Jones v. Evans*, 7 Dana, 96.

<sup>3</sup> *Howe v. Howe*, 99 Mass. 88; *Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744.

<sup>4</sup> *Bond v. Bond*, 7 Allen. 1.

<sup>5</sup> *Arnold v. Richmond Iron Works*, 1 Gray, 434.

<sup>6</sup> *Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716.

<sup>7</sup> *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716.

the voidable conveyance of his ward so as to convert a voidable title into a valid and unimpeachable title.<sup>1</sup>

63. The heirs or devisees of a grantor under guardianship, who has died without being restored to sanity, may ratify his deed. If such deed is not ratified either by the grantor, his heirs or devisees, it is ineffectual to convey any title.<sup>2</sup>

Such deed may also be disaffirmed after the death of such grantor by his heirs or devisees,<sup>3</sup> or by his executors or administrators, if they require the real estate for the payment of debts. It also seems that the administrator of such grantor may avoid his deed without showing that there are creditors of his estate.<sup>4</sup>

The heirs of the grantor may avoid his deed on the ground of insanity, either at law or in equity, without first showing that he or they have made an entry upon the land, or done any other act to avoid the deed.<sup>5</sup>

64. The deed of an insane grantor will not be set aside at the instance of a stranger, such as a creditor, or other person not his privy in blood or his legal representative.<sup>6</sup> Lord Coke says that neither one who is privy in estate nor one who is privy in tenure can set up the disability and take advantage of the

<sup>1</sup> *Funk v. Rentschler*, 134 Ind. 68, 33 N. E. Rep. 364; *New England L. & T. Co. v. Spitzer* (Kans.), 38 Pac. Rep. 799. Even a guardian's contract to sell his ward's lands, without authority to make such sale, is void. *Worth v. Curtis*, 15 Me. 228; *Fitzbush v. Wilcox*, 12 Barb. 235.

<sup>2</sup> *Valpey v. Rea*, 130 Mass. 384; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. Rep. 735.

<sup>3</sup> *Brown v. Freed*, 43 Ind. 253; *Schuff v. Ransom*, 79 Ind. 458; *Northwestern Mut. F. Ins. Co. v. Blankenship*, 94 Ind. 535, 544, 48 Am. Rep. 185, 189. *Bicknell, C. C.*, said: "When a contract is made by an insane person who remains insane continually thereafter until his death, and an action is then brought against his heirs to enforce it, they may by a proper pleading disaffirm the contract; and that it is not a good reply to such a pleading that the party was apparently of sound mind; nor that he had not been judicially declared insane; nor that the other party con-

tracted in good faith, and without suspicion of insanity; nor that no previous effort had been made to disaffirm the contract; nor that the family of the insane person had permitted him to go unattended and transact ordinary business."

<sup>4</sup> *Judge of Probate v. Stone*, 44 N. H. 593.

<sup>5</sup> *Valpey v. Rea*, 130 Mass. 384. *Contra*, *Schuff v. Ransom* 79 Ind. 458.

<sup>6</sup> *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 248, 19 Am. Dec. 71; *Hunt v. Weir*, 4 Dana, 347; *Kilbee v. Myrick*, 12 Fla. 419; *Ingraham v. Baldwin*, 9 N. Y. 45, 48; *Hoyle v. Stowe*, 2 Dev. & B. 320, 323.

In *Massachusetts* a judgment creditor of a devisee may recover land in possession of another to whom the testator, after making his will, conveyed the land while insane. This is by virtue of a statute which makes the devisee's right of entry subject to be taken on execution, and under the levy the creditor acquires the right to recover the land and to avoid the deed. *Valpey v. Rea*, 130 Mass. 384.

insanity of the grantor, and he puts this case by way of illustration: "If donee in tail, being *non compos mentis*, makes a feoffment in fee and dies without issue, he in reversion or remainder shall not enter or take advantage of the insanity of the donee."<sup>1</sup> A wife cannot maintain a bill in equity to set aside a conveyance by her husband on the ground that he was insane and incapacitated to execute a conveyance.<sup>2</sup>

65. The grantor himself may avoid his deed on account of his insanity at the time of its execution,<sup>3</sup> though the old doctrine was that a man should not be heard to stultify himself by pleading his own insanity.<sup>4</sup> But if the grantor has no mind he cannot agree in mind with another in making a conveyance or other contract.<sup>5</sup> The capacity to so agree is the essence of a contract, and without it there is no contract. If one has made a conveyance without a consenting mind, so that in effect it is not his conveyance, he does not stultify himself in saying that it is not his deed. There is no good reason why he should not in law set up his incapacity in defence where such a deed is sought to be enforced, or why he should not set it up as ground for affirmative relief in equity.

A committee cannot be appointed for a sane man because he was at one time insane. He must bring suit himself to recover his rights, and may prove insanity to avoid a deed set up against him, on the same terms as if he were defendant in the action, and the plaintiff were supporting his case with the same deed.<sup>6</sup> If he continues a lunatic, he may not appear and plead by attorney; and if it so appears on examination, the plea by attorney may, before judgment, be treated as a nullity, and a guardian be appointed, who will be entitled to plead *de novo*.<sup>7</sup>

66. A deed will not be set aside, on the ground of the incompetency of the grantor, after a long acquiescence of the parties in interest. It was so held where the deed was by a

<sup>1</sup> *Beverley's Case*, 4 Coke, 124 a. This doctrine is adopted in Maryland. *Key v. Davis*, 1 Md. 32. *v. Rusk*, 53 Md. 65; *Musselman v. Cravens*, 47 Ind. 1.

<sup>2</sup> *Kilbee v. Myrick*, 12 Fla. 419.

<sup>3</sup> *Molton v. Camroux*, 2 Exch. 487; *Bensell v. Chancellor*, 5 Whart. 371, 34 Am. Dec. 561; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Mitchell v. Kingman*, 5 Pick. 431; *Turner*

<sup>4</sup> *Beverley's Case*, 4 Coke, 123 b; *Murley v. Sherren*, 8 Ad. & El. 754.

<sup>5</sup> 1 *Parsons Cont.* 383; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766.

<sup>6</sup> *Crawford v. Scovell*, 94 Pa. St. 48, 52, 39 Am. Rep. 766, per *Trunkay, J.*

<sup>7</sup> *Mitchell v. Kingman*, 5 Pick. 431.

father to one of his sons in consideration of support, and the grantee faithfully furnished such support for many years during the father's lifetime.<sup>1</sup> But a delay of three years by an heir or devisee of a grantor alleged to be mentally incompetent to make a deed is not fatal to the action, though the land has in the mean time been transferred to an innocent purchaser.<sup>2</sup>

#### V. *Restoring Consideration on Disaffirmance.*

67. Whether a grantor or his heirs may disaffirm his deed made while the grantor was insane, without restoring the consideration to the grantee, is a question upon which the decisions are not in harmony. On the one hand, it is held that the consideration need not be restored.<sup>3</sup> "To say that an insane man, before he can avoid a voidable deed, must put the grantee in *statu quo*, would be to say in effect that, in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. If he was so far demented as not to know or recollect what the bargain was, the difficulty will be still greater. One of the obvious grounds on which the deed of an insane man or an infant is held voidable is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity which made the deed void may have wasted the price, and rendered the restoration of the consideration impossible."<sup>4</sup>

This rule applies even after the grantor has been restored to

<sup>1</sup> *Adair v. Cook* (Ky.), 5 S. W. Rep. 48, 10 N. E. Rep. 735. *Mississippi*: *Ricketts v. Joliff*, 62 Miss. 440. See *Fitzgerald v. Reed*, 9 Sm. & M. 94. *Nebraska*:

<sup>2</sup> *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. Rep. 725. *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. Rep. 276; *Rea v. Bishop* (Neb.), 59 N. W. Rep. 555. *New Hampshire*: *Flanders v. Davis*, 19 N. H. 139. *Pennsylvania*: *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *In re Desilver*, 5 Rawle, 111.

<sup>3</sup> *Indiana*: *Nichol v. Thomas*, 53 Ind. 42; *Somers v. Pumphrey*, 24 Ind. 231; *Physio-Medical College v. Wilkinson*, 108 Ind. 314; *Northwestern Mut. F. Ins. Co. v. Blankenship*, 94 Ind. 185, 48 Am. Rep. 185. *Maine*: *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705. *Maryland*: *Chew v. Bank*, 14 Md. 299. *Massachusetts*: *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414; *Foss v. Hildreth*, 10 Allen, 76; *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. Rep. 735. *Mississippi*: *Ricketts v. Joliff*, 62 Miss. 440. See *Fitzgerald v. Reed*, 9 Sm. & M. 94. *Nebraska*: *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. Rep. 276; *Rea v. Bishop* (Neb.), 59 N. W. Rep. 555. *New Hampshire*: *Flanders v. Davis*, 19 N. H. 139. *Pennsylvania*: *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *In re Desilver*, 5 Rawle, 111.

<sup>4</sup> *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414, per *Thomas, J.*, followed in *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Dec. 766.

sanity, if he has done no act to affirm the deed prior to his proceedings to avoid it and to recover the property. If, however, being restored to the full possession of his mind, he retains notes, contracts, or specific property given by the grantee for the conveyance, such retention is evidence of a ratification.<sup>1</sup> It is also held in some cases, particularly in those decided in Indiana, that where the consideration was necessary or beneficial to the grantor it should be restored upon a disaffirmance of the conveyance. Where a mortgage was given to secure the repayment of money obtained for the use and benefit of the mortgagor, in that it was applied in payment of a *bona fide* debt of the insane mortgagor, it was held that the consideration must be restored upon disaffirmance.<sup>2</sup>

68. On the other hand, the English rule, followed also in some American States, is that a deed made in good faith for a full consideration, the grantor apparently being of sound mind, and the grantee not knowing or suspecting the contrary, cannot be avoided on the ground of insanity without making restoration of the consideration paid for the conveyance.<sup>3</sup>

This rule, first applied where the consideration was necessities

<sup>1</sup> *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414, in which the case of *Arnold v. Richmond Iron Works*, 1 Gray, 434, is examined, and shown to be in accord when limited to the actual case decided.

<sup>2</sup> *Copenrath v. Kienby*, 83 Ind. 18.

<sup>3</sup> *Story's Eq. Jur.* § 228; *Buswell on Insanity*, § 413; *Bagster v. Earl of Portsmouth*, 7 Dow. & Ry. 614; *Addison v. Dawson*, 2 Vern. 678; *Selby v. Jackson*, 6 Beav. 192; *Molton v. Camroux*, 2 Exch. 487, 4 Exch. 17; *Elliot v. Ince*, 7 De G., M. & G. 475; *Price v. Berrington*, 3 Macn. & G. 486; *Campbell v. Hill*, 23 U. C. C. P. 473, affirming 22 U. C. C. P. 526. *Colorado*: *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. Rep. 175. *Illinois*: *Scanlan v. Cobb*, 85 Ill. 296; *Menkins v. Lightner*, 18 Ill. 282; *Burnham v. Kidwell*, 113 Ill. 425. *Indiana*: *Freed v. Brown*, 55 Ind. 310; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. Rep. 249; *Copenrath v. Kienby*, 83 Ind. 18. *Iowa*: *Alexander v. Haskins*, 68 Iowa, 73, 25 N. W. Rep. 935; *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. Rep. 115; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309. *Kansas*: *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. Rep. 584; *Myers v. Knabe*, 51 Kans. 720, 33 Pac. Rep. 602; *Leavitt v. Files*, 38 Kans. 26, 15 Pac. Rep. 891. *Kentucky*: *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413. *Michigan*: *Davis Sewing-Machine Co. v. Barnard*, 43 Mich. 379. *New Hampshire*: *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592. *New Jersey*: *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Yauger v. Skinner*, 14 N. J. Eq. 389. *New York*: *Loomis v. Spencer*, 2 Paige, 153. *North Carolina*: *Odom v. Riddick*, 104 N. C. 515, 10 S. E. Rep. 609; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Carr v. Holliday*, 1 Dev. & B. Eq. 344, 5 Ired. Eq. 167. *Vermont*: *Lincoln v. Buckmaster*, 32 Vt. 652. *Wisconsin*: *Blodgett v. Hitt*, 29 Wis. 169; *Mohr v. Tulip*, 40 Wis. 66.

furnished to an insane grantor without knowledge of his infirmity,<sup>1</sup> has been extended to cases where the consideration was not actually necessities, or even beneficial to the lunatic, but the consideration was money which he squandered. Of course, if the lunatic received no consideration for the conveyance, there is nothing to be restored upon a disaffirmance of the conveyance, as when a mortgage is executed for the sole benefit of a husband or other person. If the purchaser knew at the time of the purchase that the grantor was mentally incapable of executing a deed, in an action to set aside the deed he is not entitled to a return of the purchase-money.<sup>2</sup>

69. If the parties cannot be placed in *statu quo*, the title of the bona fide purchaser for value will remain good against the insane grantor and against his heirs.<sup>3</sup> The right to set aside the deed of an insane person who has not previously been declared insane is based upon the ground of fraud; and the court will not usually interfere, unless there has been fraud or a knowledge of the insanity by the other party, and will then place the parties *in statu quo*. Therefore, even when the grantee knew of the mental incapacity of the grantor, but it is found as a fact that no fraud was practised upon the grantor, or undue influence exercised to induce him to make the deed; that he acted under the advice of counsel; that the price paid was a full and fair consideration for the land; and that the grantor was benefited by the making of the deed,—a court of equity will not set aside such conveyance even as between the parties thereto, and certainly not without restoring the *status quo ante*.<sup>4</sup> Inadequacy of consideration is of itself some evidence of fraud.<sup>5</sup>

<sup>1</sup> Bagster v. Earl of Portsmouth, 7 Dow. & Ry. 614.

<sup>2</sup> Elder v. Schumacher, 18 Colo. 433, 33 Pac. Rep. 175.

<sup>3</sup> Molton v. Camroux, 2 Exch. 487, affirmed 4 Exch. 17; Niell v. Morley, 9 Ves. 478; Price v. Berrington, 3 Macn. & G. 486, per Lord Chancellor Truro; Elliot v. Ince, 7 De G., M. & G. 475, per Lord Cranworth; Selby v. Jackson, 6 Beav. 192, per Lord Langdale; Yaeger v. Skinner, 14 N. J. Eq. 389; Odom v. Riddick, 104 N. C. 515, 10 S. E. Rep. 609; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77;

Elder v. Schumacher, 18 Colo. 433, 33 Pac. Rep. 175; Scanlan v. Cobb, 85 Ill. 296; Alexander v. Haskins, 68 Iowa, 73, 25 N. W. Rep. 935; Ashcraft v. De Armond, 44 Iowa, 234; Warfield v. Warfield, 76 Iowa, 633, 41 N. W. Rep. 383; Rusk v. Fenton, 14 Bush, 490, 29 Am. Rep. 413; Gribben v. Maxwell, 34 Kans. 8, 7 Pac. Rep. 584.

<sup>4</sup> Odom v. Riddick, 104 N. C. 515, 10 S. E. Rep. 609, per Clark, J.

<sup>5</sup> Leonardson v. Hulin, 64 Mich. 1, 31 N. W. Rep. 26.

VI. *Title of Purchaser in good Faith.*

70. It is immaterial that in taking the deed the purchaser acted in good faith, and without knowledge of the grantor's insanity, and that this had not been judicially declared. One who deals with an insane person, as one who deals with an infant, does so at his peril.<sup>1</sup> The fairness of the purchaser's conduct cannot supply the grantor's want of capacity. Insanity is not always apparent; nor is the minority of an infant always apparent; and there may be a loss in dealing in good faith with either; but the rules of law cannot be changed in order to avoid all possible loss in either case.<sup>2</sup>

Where the grantee of an incompetent person mortgaged the premises to secure a loan to one who had no knowledge of the grantor's condition, a portion of the money being paid to the grantor, but a brother of the mortgagee drew the deed, and was present at its execution, and acted as agent of the mortgagee in negotiating the loan, it was held that the mortgage would not be considered as having been taken in good faith without notice, and was invalid, except as to the portion received by the grantor.<sup>3</sup>

71. The deed of an insane person not under guardianship may be avoided not only as against the grantee, but as against subsequent bona fide purchasers from the latter.<sup>4</sup> "When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith, and for an adequate

<sup>1</sup> District of Columbia: *Sullivan v. Flynn*, 20 D. C. 396. Indiana: *Somers v. Pumphrey*, 24 Ind. 231; *Northwestern Mut. F. Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 320; *Hull v. Louth*, 109 Ind. 315, 58 Am. Rep. 405. Maine: *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705. Massachusetts: *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. Rep. 735; *Gibson v. Soper*, 6 Gray, 279, 282, 66 Am. Dec. 410; *Seaver v. Phelps*, 11 Pick. 304, 306, 22 Am. Dec. 372. New York: *Van Deusen v. Sweet*, 51 N. Y. 378. Pennsylvania: *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470.

<sup>2</sup> *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372, per Wilde, J.

<sup>3</sup> *Sponable v. Hanson*, 87 Mich. 204, 49 N. W. Rep. 644.

<sup>4</sup> *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Mohr v. Tulip*, 40 Wis. 66; *Somers v. Pumphrey*, 24 Ind. 231; *Hull v. Louth*, 109 Ind. 315, 10 N. E. Rep. 270, 58 Am. Rep. 405; *Van Deusen v. Sweet*, 51 N. Y. 378; *Goodyear v. Adams*, 5 N. Y. Supp. 275; *Dewey v. Allgire*, 37 Neb. 61, 55 N. W. Rep. 276; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. Rep. 512, per Marston, J.: "If the acts of an insane person can thus be made valid and binding, an easy method is thereby found for disposing of his property."

consideration, a title from such grantee. He has the ability to convey an indefeasible title, and he does convey such title to all *bona fide* purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee whose title is thus derived must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the grantee."<sup>1</sup>

72. It has been held, however, in a few cases, that the title of a purchaser in good faith from the grantee will not be disturbed, though the deed to the grantee be voidable on account of the insanity of the grantor.<sup>2</sup> Of course, to entitle such purchaser to protection, it must appear that he purchased without notice of the insanity of the prior grantor, and that he paid a full and fair price for the conveyance to himself.<sup>3</sup> The presumption of the law is in favor of sanity. "When, therefore, a purchaser sees a regular chain of title, formal in all particulars, upon the registration books, executed by grantors of full age, and not *femes covert*, he has a right to rely upon the presumption of sanity; and if, without any notice, or matter to put him upon inquiry, and for fair value, he takes a deed, he should be protected. Any other doctrine would place all titles upon the hazard. If the title of an innocent purchaser for value and without notice can be upset for the alleged mental incapacity of one grantor, it can be done though the grantor may have been a very remote one."<sup>4</sup>

Where the immediate grantee of an insane person took for value and without notice of the grantor's insanity, a subsequent purchaser from such innocent grantee for value, though with notice of the original grantor's incapacity, is not affected by it, but obtains a good title.<sup>5</sup>

<sup>1</sup> *Hovey v. Hobson*, 53 Me. 451, 458, 89 Am. Dec. 705, per Appleton, C. J. As to evidence of notice of insanity, see *Beavan v. M'Donnell*, 10 Exch. 184.

<sup>2</sup> *Greenslade v. Dare*, 20 Beav. 284; <sup>4</sup> *Odom v. Riddick*, 104 N. C. 515, 10 S. E. Rep. 609. *Odom v. Riddick*, 104 N. C. 515, 10 S. E. Rep. 609.

<sup>3</sup> *Odom v. Riddick*, 104 N. C. 515, 524, 10 S. E. Rep. 609; *New England L. & T. Co. v. Spittler* (Kans.), 38 Pac. Rep. 799. <sup>5</sup> *Ashcraft v. De Armond*, 44 Iowa, 229; *Odom v. Riddick*, 104 N. C. 515, 524, 10 S. E. Rep. 609.



73. Account of rents and profits. — When a conveyance is set aside on account of the grantor's insanity, the grantee or other person in possession is ordinarily obliged to account for the rents and profits during the time he has had possession.<sup>1</sup> If the property is not rented, the grantee is held to account for the actual rental value of it from the time he came into possession.

<sup>1</sup> Price v. Berrington, 7 Hare, 394; Fitz- ington v. Campbell (Ky.), 1 S. W. Rep. gerald v. Reed, 9 Sm. & M. 94; Worth- 714.

## CHAPTER IV.

### DISABILITY FROM DRUNKENNESS.

74. **Intoxication.** — The incompetence of a drunkard to make a deed is unlike that of a person generally insane; for the drunkard's incompetency must be shown by proof that, at the time of his execution of the deed, his understanding was clouded or his reason dethroned by actual intoxication.<sup>1</sup> Of course, incapacity may be induced by a long course of drunkenness; but in such case the incapacity is that of insanity rather than that of temporary intoxication.<sup>2</sup> It must be shown, moreover, that the grantor was so intoxicated that he was incapable of comprehending the effect of what he was doing.<sup>3</sup> A moderate degree of intoxication, which does not deprive the mind of the power of rational consent, does not of itself avoid a deed. But a deed made by one not excessively intoxicated may be avoided in equity, on the ground of fraud, upon proof that the grantee drew the

<sup>1</sup> *Cooke v. Clayworth*, 18 Ves. 15; *Pitt v. Smith*, 3 Camp. 33; *Ayrey v. Hill*, 2 Addam's Ecc. 206; *Gore v. Gibson*, 13 Mees. & W. 623; *Van Wyck v. Brasher*, 81 N. Y. 260; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Jenners v. Howard*, 6 Blackf. 240; *Cummings v. Henry*, 10 Ind. 109; *Arnold v. Hickman*, 6 Munf. 15; *Taylor v. Patrick*, 1 Bibb, 168; *Shackelton v. Seabee*, 86 Ill. 616.

<sup>2</sup> *Wilson v. Bigger*, 7 Watts & S. 111; *Miskey's App.* 107 Pa. St. 611; *Wiley v. Ewalt*, 66 Ill. 26; *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Samuel v. Marshall*, 3 Leigh, 567.

<sup>3</sup> *Shackelton v. Seabee*, 86 Ill. 616; *Reinsch v. Rogge*, 37 Ind. 207; *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Donelson v. Posey*, 13 Ala. 752; *Caulkins v. Fry*, 35 Conn. 170; *Foot v. Tewksbury*, 2 Vt. 97; *Birdsong v. Birdsong*, 2 Head,

289; *Mansfield v. Watson*, 2 Iowa, 111; *Pickett v. Sutter*, 5 Cal. 412; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Prentice v. Achorn*, 2 Paige, 30; *Newell v. Fisher*, 19 Miss. 431, 49 Am. Dec. 66; *Morris v. Clay*, 8 Jones, 216; *Bursinger v. Bank*, 67 Wis. 75, 30 N. W. Rep. 290.

"Where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine that a man shall not be allowed to allege his own lunacy or intoxication, and total drunkenness is now held to be a defence." *Gore v. Gibson*, 13 M. & W. 623, 626, per Parke, B.

grantor into drink, and took advantage of his intoxication to get him to execute the deed.<sup>1</sup>

75. The fact to be proved is the condition of the grantor at the time the deed was executed. From the nature of the disqualifying cause, the proof is much more closely limited to the time of the transaction of the business than the proof is in case of insanity.<sup>2</sup> Intoxication is a temporary disability; insanity is permanent, or, usually at least, long continued. But evidence of the condition of the grantor, several hours after the transaction, may be received as tending to throw light on his condition when the deed was executed.<sup>3</sup>

When incapacity by reason of drunkenness is set up as a ground for annulling a deed, the vital inquiry is as to his capacity when the deed was executed, not as to his capacity when drunk. If the evidence shows that, on the occasion when the deed was executed, the grantor was perfectly sober, and possessed sufficient capacity to dispose of his property with an intelligent understanding of what he was doing, it does not matter that it appears that he was often intoxicated, and that when in that condition he was incapacitated to transact business; nor does it matter that it also appears that the grantor, from habitual dissipation, was in such an enfeebled condition of mind or body, immediately before or immediately after the execution of the deed, as to render him incompetent to transact business. Such evidence throws the burden of proof as to his capacity at the date of the execution of the deed upon the grantee who claims title under it. This burden is met by evidence of undoubted capacity at that particular time.<sup>4</sup>

76. Ordinarily the grantee would know of the grantor's intoxication, when this had gone to the extent of rendering him incapable of transacting business intelligently; and on this ground his dealing with a person excessively intoxicated may be

<sup>1</sup> *Manaffield v. Watson*, 2 Iowa, 111; *Birdsong v. Birdsong*, 2 Head, 289.

A case in equity to set aside a deed on account of the grantor's intoxication at the time, amounting to incapacity on his part, must be decided on its own merits, without regard to previous decisions in cases differing in the facts. *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. Rep. 1001.

<sup>2</sup> *Peck v. Cary*, 27 N. Y. 9, 17, 84 Am. Dec. 220; *Andress v. Weller*, 3 N. J. Eq. 604.

<sup>3</sup> *Phelan v. Gardner*, 43 Cal. 306.

<sup>4</sup> *Ralston v. Turpin*, 129 U. S. 663, 671, 9 Sup. Ct. Rep. 420, per Harlan, J. And see *Conley v. Nailor*, 118 U. S. 127, 131, 6 Sup. Ct. Rep. 1001.

regarded as *prima facie* fraudulent. When such knowledge is shown, or when it is shown that the grantor's intoxication was produced by the art or connivance of the grantee, or that the latter took undue advantage of the grantor's situation, equity will, in behalf of the grantor, relieve against the conveyance.<sup>1</sup> But equity will not ordinarily assist the grantee, who has obtained a deed from the grantor while intoxicated, in avoiding the deed.<sup>2</sup> In some cases it is said that equity will not relieve the grantor from his conveyance made while intoxicated, unless it be shown that the grantee connived at the intoxication, or took undue advantage of the grantor in consequence of his condition.<sup>3</sup>

But the better rule is, that the grantor may avoid his deed in such case although the intoxication was voluntary, and not in any way procured by the connivance of the other party.<sup>4</sup> If it is shown that the grantor was intoxicated at the time of executing a deed, inadequacy of price is direct evidence of fraud.<sup>5</sup> But if a person, while intoxicated, voluntarily executes a deed of trust for the benefit of his wife and children, the state of intoxication not being induced by them or on their behalf, equity will not set it aside.<sup>6</sup>

Where one purchased land and took a conveyance with full knowledge that proceedings had been instituted in the court of chancery against the grantor as an habitual drunkard; that a commission had been issued to inquire as to his incapacity to manage his affairs; and that the sheriff was then summoning a jury to try such inquisition, — the conveyance was set aside, with costs, on a bill filed by the committee of the person and estate of the habitual drunkard.<sup>7</sup>

**77. The burden of proving intoxication is upon the party**

<sup>1</sup> *Burroughs v. Richman*, 13 N. J. L. 233, 23 Am. Dec. 717; *Warnock v. Campbell*, 25 N. J. Eq. 485; *Johnson v. Phifer*, 6 Neb. 401; *State Bank v. McCoy*, 69 Pa. St. 204, 8 Am. Rep. 246.

<sup>2</sup> *Cooke v. Clayworth*, 18 Ves. Jr. 12.

<sup>3</sup> *Johnson v. Medlicott*, cited in 3 P. Wms. 130; *Cory v. Cory*, 1 Ves. 19; *Dunnage v. White*, 1 Swanst. 137; *Pittenger v. Pittenger*, 3 N. J. Eq. 156; *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Rodman v. Zilley*, 1 N. J. Eq. 320; *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Campbell v. Ketcham*, 1 Bibb, 406

<sup>4</sup> *Pitt v. Smith*, 3 Camp. 33; *Barrett v. Buxton*, 2 Aik. 167, 16 Am. Dec. 691; *Mansfield v. Watson*, 2 Iowa, 111; *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441.

<sup>5</sup> *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Mead v. Coombs*, 2 N. J. Eq. 173; *Reynolds v. Waller*, 1 Wash. (Va.) 164; *Hutchinson v. Tindall*, 3 N. J. Eq. 357.

<sup>6</sup> *Hutchinson v. Tindall*, 3 N. J. Eq. 357.

<sup>7</sup> *Griswold v. Miller*, 15 Barb. 520. And see *Frost v. Beavan*, 17 Jur. 369.

who sets up this fact in defence.<sup>1</sup> But under a statute whereby a person is adjudicated an habitual drunkard from a time prior to the inquest, the burden of proof is shifted, as to contracts made within the period covered by the finding, to the other party, and the drunkard is *prima facie* incompetent to contract; and, as to contracts made after such finding, the adjudication is conclusive evidence of his incapacity.<sup>2</sup>

78. The deed of a person rendered incompetent by intoxication is voidable only, and not void. He may ratify or disaffirm the deed on becoming sober.<sup>3</sup> Any unreasonable delay in avoiding the deed will be taken as a confirmation of it.<sup>4</sup>

The defence of drunkenness, moreover, like that of duress, infancy, or insanity, is a personal one; and if the grantor, who has made a deed while drunk, chooses to abide by it when sober, no third person can interpose the defence.<sup>5</sup>

A deed may be avoided at law on the ground of the grantor's incompetency; but when it is sought to avoid it on the ground of the fraud of the grantee in connection with the grantor's drunkenness, the remedy is in equity.<sup>6</sup>

<sup>1</sup> Black v. Ellis, 3 Hill (S. C.), 68.

<sup>2</sup> Klohs v. Klohs, 61 Pa. St. 245; Leckey v. Cunningham, 56 Pa. St. 370; Imhoff v. Witmer, 31 Pa. St. 243; Clark v. Caldwell, 6 Watts, 139.

<sup>3</sup> Matthews v. Baxter, L. R. 8 Exch. 132; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; McGuire v. Callahan, 19 Ind. 128; Jenners v. Howard, 6 Blackf. 240; Eaton v. Perry, 29 Mo. 96; Broad-

water v. Darne, 10 Mo. 277; Arnold v. Hickman, 6 Munf. 15; Williams v. Inabnet, 1 Bailey (S. C.), 343.

<sup>4</sup> Williams v. Inabnet, 1 Bailey (S. C.), 343; Cummings v. Henry, 10 Ind. 109.

<sup>5</sup> Cole v. Gibbons, 3 P. Wms. 290; Eaton v. Perry, 29 Mo. 96.

<sup>6</sup> Mansfield v. Watson, 2 Iowa, 111; Birdsong v. Birdsong, 2 Head, 289.

## CHAPTER V.

### DISABILITY FROM DURESS.

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| I. Duress by imprisonment, 79, 80. | IV. Defence and proof of duress, 90-92. |
| II. Duress by threats, 81-88.      | V. Duress renders deed voidable only,   |
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#### I. *Duress by Imprisonment.*

**79.** Duress by imprisonment occurs where there is detention of the person without warrant of law; where there has been an abuse of legal process by arrest upon a false charge, or without probable cause; where there has been a lawful arrest, but for an unlawful purpose; or where there has been an arrest legal in its inception, but followed by maltreatment of the prisoner. An arrest for an improper purpose without a just cause, or an arrest for a just cause without lawful authority, or an arrest for a just cause and under lawful authority for unlawful purposes, may be construed a duress.<sup>1</sup>

<sup>1</sup> *Stepney v. Lloyd*, 2 Cro. Eliz. 647; *New York*: *Osborn v. Robbins*, 36 N. Y. 365; *Strong v. Grannis*, 26 Barb. 122; *Brown v. Pierce*, 7 Wall. 205, 215. *Alabama*: *Hatter v. Greenlee*, 1 Port. 222, 26 Am. Dec. 370. *Colorado*: *Lighthall v. Thompson v. Lockwood*, 15 Johns. 256; *Moore*, 2 Colo. App. 554, 31 Pac. Rep. 511. *Illinois*: *Taylor v. Marcum*, 16 Ill. 93; *Shenk v. Phelps*, 6 Ill. App. 612. *Indiana*: *Brooks v. Berryhill*, 20 Ind. 97. *Kansas*: *Winfield Nat. Bank v. Croco*, 46 Kans. 620, 26 Pac. Rep. 939. *Maine*: *Crowell v. Gleason*, 10 Me. 325, 333; *Whitefield v. Longfellow*, 13 Me. 146; *Soule v. Bonney*, 37 Me. 128. *Massachusetts*: *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Morse v. Woodworth*, 155 Mass. 233, 251, 27 N. E. Rep. 1010, 29 N. E. Rep. 525. *Michigan*: *Seiber v. Price*, 26 Mich. 518. *New Hampshire*: *Richardson v. Duncan*, 3 N. H. 508; *Breck v. Blanchard*, 22 N. H. 303, 51 Am. Dec. 222; *Severance v. Kimball*, 8 N. H. 386. *North Carolina*: *Ware v. Nesbit*, 94 N. C. 664, 668. *Pennsylvania*: *Stouffer v. Latshaw*, 2 Watts, 165, 27 Am. Dec. 297. *Texas*: *Spaulding v. Crawford*, 27 Tex. 155; *Phelps v. Zuschlag*, 34 Tex. 371. *Wisconsin*: *Brown v. Peck*, 2 Wis. 261; *Fay v. Oatley*, 6 Wis. 42, 45.

Though an arrest is made under a legal warrant, if one of the objects of the arrest was to extort money, or enforce the settlement of a civil claim, such arrest is a false imprisonment, and a release or conveyance of property obtained thereby is void. The discharge of the person arrested without examination before a magistrate, and without a return of the warrant, is a circumstance to be considered by the jury as bearing upon the question of duress.<sup>1</sup> Security obtained in this manner may be avoided, although the claim secured was just in itself.<sup>2</sup>

80. There is no duress where the imprisonment is under legal process properly obtained for a probable cause, with no ulterior purpose, and a deed voluntarily executed by the prisoner to obtain his deliverance cannot be avoided on the ground of duress.<sup>3</sup> A deed executed in accordance with a decree of court cannot be said to be executed under duress.<sup>4</sup>

A gold-refiner, who had confessed that he had taken gold intrusted to him by his employers, while under arrest at the police station executed a mortgage of his lands to secure repayment of the value of the gold so taken. He was afterwards indicted for the offence, pleaded guilty, and was sentenced. In an action to foreclose the mortgage, it was held that it was not void on the ground of duress.<sup>5</sup>

## II. *Duress by Threats.*

81. Threats may constitute duress, and invalidate a deed procured by that means. Actual violence or imprisonment is not necessary to constitute duress. Consent is of the essence of a valid contract, and there is no consent when a party acts by com-

<sup>1</sup> *Hackett v. King*, 8 Allen, 144, 85 Am. Dec. 695; *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. Rep. 525; *Williams v. Walker*, 18 S. C. 577; *Seiber v. Price*, 26 Mich. 518; *Phelps v. Zuschlag*, 34 Tex. 371. **Massachusetts**: *Felton v. Gregory*, 130 Mass. 176. **Michigan**: *Rood v. Winslow*, 2 Dougl. 68; *Prichard v. Sharp*, 51 Mich. 432, 16 N. W. Rep. 798; *State Bank v. Chappelle*, 40 Mich. 447. **Missouri**: *Holmes v. Hill*, 19 Mo. 159. **New Hampshire**:

<sup>2</sup> *Osborn v. Robbins*, 36 N. Y. 365. See, however, *Diller v. Johnson*, 37 Tex. 47. **Nealley v. Greenough, 25 N. H. 325; *Alexander v. Pierce*, 10 N. H. 494. **New Jersey**: *Smillie v. Smith*, 32 N. J. Eq. 51; *Clark v. Turnbull*, 47 N. J. L. 265.**

<sup>3</sup> *Plant v. Gunn*, 2 Woods, 372. **Alabama**: *Hatter v. Greenlee*, 1 Port. 222, 26 Am. Dec. 370. **Georgia**: *Smith v. Atwood*, 14 Ga. 402. **Illinois**: *Heaps v. Dunham*, 95 Ill. 583. **Maine**: *Eddy v. Herrin*, 17 Me. 338, 35 Am. Dec. 261. **Pennsylvania**: *Stouffer v. Latshair*, 2 Watts, 167, 27 Am. Dec. 297. **Wisconsin**: *Oconto Co. v. Hall*, 42 Wis. 59.

<sup>4</sup> *Eldridge v. Trustees*, 111 Ill. 576.

<sup>5</sup> *Smillie v. Smith*, 32 N. J. Eq. 51.

pulsion. Moral compulsion, produced by threats of great bodily harm or of arrest, is sufficient to destroy a party's free agency, without which he can give no consent and make no valid contract. To constitute duress, the threats must be such as to strike the threatened person with such fear as to take away his free agency. They must afford a reasonable ground of fear of bodily injury or of restraint of liberty.<sup>1</sup> Duress by mere advice, direction, influence, and persuasion, or pressure of public opinion, is unknown to the law.<sup>2</sup>

In a case before the Supreme Court of the United States, Mr. Justice Clifford said:<sup>3</sup> "Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, as such threats, it is said, are not of a nature to overcome the will of a firm and prudent man; but many other decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts, because, in such a case, there is nothing but the form of a contract without the substance. Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubt-

<sup>1</sup> *Baker v. Morton*, 12 Wall. 150; *United States v. Huckabee*, 16 Wall. 414, 431, per Clifford, J.; *Brown v. Pierce*, 7 Wall. 205, 215; *Radich v. Hutchins*, 95 U. S. 210; *McClair v. Wilson* (Colo.), 31 Pac. Rep. 502; *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241; *Love v. State*, 78 Ga. 66, 3 S. E. Rep. 893; *Hamilton v. Smith*, 57 Iowa, 15, 10 N. W. Rep. 276; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Taylor v. Jaques*, 106 Mass. 291; *Goodrich v. Shaw*, 72 Mich. 109, 40 N. W. Rep. 187; *Goodrich v. Cushman*, 34 Neb. 460, 51 N. W. Rep. 1041; *Barrett v. Weber*, 125 N. Y. 18, 25 N. E. Rep. 1068; *Richards v. Vanderpoel*, 1 Daly, 71; *Doolittle v. McCullough*, 7 Ohio St. 299; *Bueter v. Bueter*, 1 S. D. 94, 45 N. W. Rep. 208.

<sup>2</sup> *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241; *State v. Sluder*, 70 N. C. 55; *Wallach v. Hoexter*, 17 Abb. N. C. 267; *Jones v. Rogers*, 36 Ga. 157; *Ritter v.*

*Bell* (Ky.), 2 S. W. Rep. 675; *Gabbey v. Forgeus*, 38 Kana. 62, 15 Pac. Rep. 866; *Dolman v. Cook*, 14 N. J. Eq. 56.

In *Harshaw v. Dobson*, 64 N. C. 384, where the owners of land had given a bond to convey upon the payment of a certain sum of money in coin, the debtor, during the war of the Rebellion, asked the court to be allowed to pay the debt in Confederate money, and the judge sent word to the creditor that, if he did not receive this money and execute a deed, he would have him sent to Richmond, whereupon the creditor, being under fear and infirm, received the money and executed a deed. It was held that the deed was invalid. So where a deed was executed under a threat of death unless the owner accepted Confederate money in payment. *Bogle v. Hammons*, 2 Heisk. 136.

<sup>3</sup> *United States v. Huckabee*, 16 Wall. 414, 432.



edly be, in many cases, sufficient to overcome the mind and will of a person entirely competent in all other respects to contract; and it is clear that a contract made under such circumstances is as utterly without the voluntary consent of the party menaced as if he were induced to sign it by actual violence."

82. Threats constitute duress when they are such as to overcome the free agency of the person threatened. It has sometimes been said that the fear which will invalidate a contract executed under its influence must be such as would influence a mind of the greatest constancy, or at any rate a mind of ordinary firmness and force.<sup>1</sup> But the doctrine now generally approved is, that, while the fear must be such as to destroy the free agency of the person threatened, yet the threats that would be sufficient to overcome the free agency of one person might have little or no influence upon another. Therefore, whether the threats used in any particular case constitute duress, and are a defence to an instrument executed at the time, must depend very much upon the circumstances of the case and the physical and mental condition of the person threatened.<sup>2</sup> The age, temperament, health, experience, and sex of the person to whom the threats are directed may properly be considered. This was the decision in a Pennsylvania case, where it was held that, if the threats employed were such as were calculated to deprive the person threatened of his freedom of will, he will be relieved from the obligation of a contract executed under their influence, although the threats were

<sup>1</sup> *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241; *Walbridge v. Arnold*, 21 Conn. 424; *Bosley v. Shanner*, 26 Ark. 280.

<sup>2</sup> *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. Rep. 525; *Parmenter v. Pater*, 13 Oreg. 121; *Blair v. Coffman*, 2 Overt. 176, 5 Am. Dec. 659; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. Rep. 587, 24 Am. St. Rep. 172; *Miller v. Miller*, 68 Pa. St. 486, per *Agnew, J.*; *Motz v. Mitchell*, 91 Pa. St. 114. See article by W. H. Phillips, 14 Am. L. Reg. N. S. 201; *Jordan v. Elliott*, 12 W. N. C. 56, 59, 15 Cent. L. J. 232. And see 15 Cent. L. J. 262. The court said: "We are aware that neither under the rule of the civil nor common law, as formerly expressed, would there be

sufficient to release Mrs. Elliott from her contract. For, according to Blackstone, the threats to produce such an effect must be of such a character as to induce a well-grounded fear in the mind of a firm and courageous man of the loss of life or limb; and the rule of the civil law was of like import: the fear must be of that kind which would influence a man of the greatest constancy. . . . Pothier regards this rule as too rigid, and approves the better doctrine, that regard must be had to the age, sex, and condition of the parties; since that fear, which would be insufficient to influence a man in the prime of life and of military character, might be deemed sufficient to avoid the contract of a woman or man in the decline of life."

not of such a character as would produce a like effect upon a firm and courageous man.

Whether a deed has been obtained by duress, *per minas*, is usually a question of fact for the jury, and not one of law to be determined by the court. It is not sufficient in such a case to satisfy the trial court that threats were uttered, but it must also be shown that they constrained the will of the promisor and induced the promise.<sup>1</sup>

83. There need be no direct threats of prosecution to render invalid a deed or mortgage given to prevent a prosecution. Thus, where a son forged his father's name upon notes, and the bankers who held them insisted that the father should make a settlement, saying to him that they did not wish to exercise pressure if the matter could be satisfactorily arranged; that it was "a serious matter;" that, if the notes are the father's, "we are all right; if they are not, we have one course to pursue; we cannot be parties to compounding a felony;" and the father thereupon took up the notes, giving an agreement which was in effect an equitable mortgage, — it was held that the agreement was invalid.<sup>2</sup> Lord Westbury said: "The question, therefore, my lords, is, whether a father appealed to under such circumstances to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution with the certainty of conviction, can be regarded as a free and voluntary agent. I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon from the father of the felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father when brought into the situation of refusing, or leaving his son

<sup>1</sup> *Dunham v. Griswold*, 100 N. Y. 224, 226, 227, 3 N. E. Rep. 76, per Earl, J.; *Gates v. Dundon*, 18 N. Y. Supp. 149; *Ingersoll v. Roe*, 65 Barb. 346.

<sup>2</sup> *Williams v. Bayley*, L. R. 1 H. L. 200, 218, 14 L. T. Rep. 802, 35 L. J. Ch. 717, explained in *McClatchie v. Haslam*, 65 L. T. Rep. N. S. 691, 17 Cox Crim. Cas. 402, 63 L. T. Rep. N. S. 376; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419.

in that perilous condition, or of taking on himself the amount of that civil obligation."

**84.** Relief may sometimes be had in equity against threats which do not amount to legal duress. Such relief may be granted when a deed has been fraudulently procured through the fears, affections, or sensibilities of the grantor excited by threats; as, for instance, where the grantor has made a conveyance in consequence of threats of a criminal prosecution of his brother.<sup>1</sup> Equity will grant relief in such cases, though there would be no remedy at law. Cases of this kind, however, more properly come under the description of cases of undue influence,<sup>2</sup> from which cases of duress are sometimes hardly to be distinguished.<sup>3</sup> When the coercion is only a social or domestic force, and not a menace to life or limb or of imprisonment, it more properly comes under the designation of undue influence.<sup>4</sup>

The threat of a husband to abandon his wife, unless she executes a mortgage of her separate property to secure his debt, is an improper pressure, and the mortgage may be avoided by her on the ground of duress, if the threat induced the execution of the mortgage, and was made with the knowledge and consent of the mortgagee, or he knew at the time of taking the mortgage that it was executed by reason of such threat.<sup>5</sup> But the threat of a husband against his own life made to induce his wife to execute a contract does not amount to duress, and is no defence to an action against the wife on her contract.<sup>6</sup>

**85.** A threat of an unlawful arrest is duress which will avoid a deed or mortgage procured thereby.<sup>7</sup> A threat of an

<sup>1</sup> *Meech v. Lee*, 82 Mich. 274, 46 N. W. Rep. 383; *Davis v. Luster*, 64 Mo. 43; *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. Rep. 946.

<sup>2</sup> *Pomeroy's Eq. Jur.* §§ 950, 951.

<sup>3</sup> *Lighthall v. Moore*, 2 Colo. App. 554.

<sup>4</sup> *Hartnett v. Hartnett* (Neb.), 60 N. W. Rep. 362; *Edwards v. Bowden*, 107 N. C. 58, 12 S. E. Rep. 58.

<sup>5</sup> *Line v. Blizzard*, 70 Ind. 23, *Kocourek v. Marak*, 54 Tex. 201, 33 Am. Rep. 623; *Tapley v. Tapley* 10 Minn. 448, 88 Am. Dec. 76. See, however, *Edwards v. Bowden*, 107 N. C. 58, 12 S. E. Rep. 58; *Wallach v. Hoexter*, 17 Abb. N. C. 267.

<sup>6</sup> *Wright v. Remington*, 41 N. J. L. 48,

32 Am. Rep. 180, 18 Am. L. Reg. (N. S.) 743; *Remington v. Wright*, 43 N. J. L. 451; *Lefebvre v. Dutruit*, 51 Wis. 326, 8 N. W. Rep. 149, 37 Am. Rep. 833; *Metropolitan L. Ins. Co. v. Meeker*, 85 N. Y. 614.

<sup>7</sup> *Foss v. Hildreth*, 10 Allen, 76; *Foshay v. Ferguson*, 5 Hill, 154; *Knapp v. Hyde*, 60 Barb. 80; *Richards v. Vanderpoel*, 1 Daly, 71; *Bush v. Brown*, 49 Ind. 573, 19 Am. Rep. 695; *Bane v. Detrick*, 52 Ill. 19; *Thurman v. Burt*, 53 Ill. 129; *Helm v. Helm*, 11 Kans. 19; *Winfield Nat. Bank v. Croco*, 46 Kans. 620, 26 Pac. Rep. 939; *Hullhorst v. Scharner*, 15 Neb. 57, 17 N. W. Rep. 259; *Churchill v. Scott*,

arrest on a criminal charge may amount to such duress as will avoid a conveyance, if it is made with knowledge that no offence has been committed, and for the wrongful purpose of exciting the fears and overcoming the free will of him to whom the threat is addressed.<sup>1</sup> The threat of a criminal prosecution used to compel the giving of a deed or contract may constitute duress, although no threats were made at the time, if they were made a few days before and had not been retracted; provided they induced a reasonable and well-grounded belief that the person threatened would be arrested and prosecuted on a criminal charge if he did not execute such deed or contract.<sup>2</sup>

In some cases it has been held that threats of criminal prosecution do not constitute duress unless accompanied by threats of immediate imprisonment, or threats which induce a reasonable fear of immediate imprisonment.<sup>3</sup> The distinction is, that a threat of prosecution merely, before the commencement of any proceedings, does not necessarily include imprisonment. The threat must imply imprisonment, and an imprisonment which is illegal.

86. A threat of arrest or imprisonment which is lawful or justifiable is not duress which will invalidate a deed executed in order to avoid it. A threat to cause the arrest and imprisonment of a person on a criminal charge does not amount to such menace as will serve to invalidate a deed made by him to prevent such arrest, although it is executed under the pressure of such threat,

65 Mich. 479, 32 N. W. Rep. 653; Hoyt v. Dewey, 50 Vt. 465; James v. Roberts, 18 Ohio, 548; Meadows v. Smith, 7 Ired. Eq. 7; Williams v. Walker, 18 S. C. 577; Landa v. Obert, 78 Tex. 33, 14 S. W. Rep. 297.

be actual imprisonment, and not threats merely.

<sup>1</sup> Baker v. Morton, 12 Wall. 150; Brown v. Pierce, 7 Wall. 205; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Alexander v. Pierce, 10 N. H. 494, 498; Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; Bane v. Detrick, 52 Ill. 19; Sanford v. Sornborger, 26 Neb. 295, 41 N. W. Rep. 1102; Gregor v. Hyde, 62 Fed. Rep. 107, per Thayer, J.; Eddy v. Herrin, 17 Me. 338; James v. Roberts, 18 Ohio, 548, practically overruling Moore v. Adams, 8 Ohio, 372, 32 Am. Dec. 723, where it was held that, to set aside a deed on the ground of duress of imprisonment, there must

<sup>2</sup> Jaylor v. Jaques, 106 Mass. 291; Youngs v. Simm, 41 Ill. App. 28; Wells v. Sluder, 70 N. C. 55.

<sup>3</sup> Plant v. Gunn, 2 Woods, 372; Harmon v. Harmon, 61 Me. 227, 14 Am. Rep. 556; Higgins v. Brown, 78 Me. 473, 5 Atl. Rep. 269; Seymour v. Prescott, 69 Me. 376; Hilborn v. Bucknam, 78 Me. 482, 7 Atl. Rep. 272; Moore v. Adams, 8 Ohio, 372, 32 Am. Dec. 723; Landa v. Obert, 45 Tex. 539; Catlin v. Henton, 9 Wis. 476; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. Rep. 321; Claffin v. McDonough, 33 Mo. 412, 84 Am. Dec. 54; Buchanan v. Salein, 9 Mo. App. 552; Fulton v. Hood, 34 Pa. 365, 75 Am. Dec. 664; Miller v. Miller, 68 Pa. 486; Youngs v. Simm, 41 Ill. App. 28.

if he was justly amenable to criminal prosecution and there are no circumstances of oppression or fraud, or he was in good faith believed to be liable to such prosecution.<sup>1</sup> What constitutes a lawful arrest or imprisonment is a question upon which there is some variance of opinion. The views expressed by Mr. Justice Knowlton in a recent decision in Massachusetts seem to be sound: "It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is, whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat, which was made for the purpose of forcing a guilty person to enter into a contract, may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose; and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's."<sup>2</sup>

<sup>1</sup> *Crowne v. Baylis*, 31 Beav. 351; *Gregor v. Hyde*, 62 Fed. Rep. 107; *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. Rep. 1102; *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. Rep. 718, 30 Am. St. Rep. 335; *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. Rep. 272, 57 Am. Rep. 816; *Eddy v. Herrin*, 17 Me. 338, 35 Am. Dec. 261; *Whitefield v. Longfellow*, 13 Me. 146; *Alexander v. Pierce*, 10 N. H. 494; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Legg v. Leyman*, 8 Blackf. 148; *Work's App.* 59 Pa. St. 444; *Fulton v. Hood*, 34 Pa. St. 365, 75 Am. Dec. 664; *Stouffer v. Latashaw*, 2 Watts, 165, 27 Am. Dec. 297; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Sickles v. Carson*, 26 N. J. Eq. 440;

*Claffin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54; *Davis v. Luster*, 64 Mo. 43.

<sup>2</sup> *Morse v. Woodworth*, 155 Mass. 233, 251, 29 N. E. Rep. 525. "We are aware," further say the court, "that there are cases which tend to support the contention of the defendant. *Harmon v. Harmon*, 61 Me. 227; *Bodine v. Morgan*, 10 Stew. 426, 428; *Landa v. Obert*, 45 Tex. 539; *Knapp v. Hyde*, 60 Barb. 80. But we are of opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. *Hackett v. King*, 6 Allon, 58; *Taylor v. Jaques*,

87. It is not duress for one who believes that he has a good cause of action, or has been wronged, to threaten the wrong-doer with a civil suit.<sup>1</sup> And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution.<sup>2</sup> It is not duress to threaten the foreclosure of an existing mortgage upon the property in order to induce a wife to execute a new mortgage.<sup>3</sup> A threat to bring a civil suit to compel the execution of a deed, unless the person threatened make such deed, does not constitute such duress as will avoid the deed.<sup>4</sup>

The threat of a judgment creditor to levy execution on the property of his judgment debtor, or to arrest him on such execution, is not such a duress as will render a deed or other contract made by the latter to avoid such levy invalid.<sup>5</sup> But a contract extorted by the illegal use of an execution, and under circumstances showing oppression on the part of the creditor, may be avoided.<sup>6</sup>

88. A husband and wife or parent and child may each

106 Mass. 291; *Harris v. Carmody*, 131 Mass. 51; *Bryant v. Peck, &c. Co.* 154 Mass. 460, 28 N. E. Rep. 678; *Williams v. Bayley*, L. R. 1 H. L. 200, 4 Giff. 638, 663, note; *Eadie v. Slimmon*, 26 N. Y. 9; *Adams v. Irving National Bank*, 116 N. Y. 606, 23 N. E. Rep. 7; *Foley v. Greene*, 14 R. I. 618; *Sharon v. Gager*, 46 Conn. 189; *Bane v. Detrick*, 52 Ill. 19; *Fay v. Oatley*, 6 Wis. 42." See, also, *Barrett v. Weber*, 125 N. Y. 18, 25 N. E. Rep. 1068.

<sup>1</sup> *Jones v. Houghton*, 61 N. H. 51; *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. Rep. 714; *Dixon v. Dixon*, 22 N. J. Eq. 91; *Tooker v. Sloan*, 30 N. J. Eq. 394; *Hunt v. Bass*, 2 Dev. Eq. 292, 24 Am. Dec. 274; *Dausch v. Crane*, 109 Mo. 323, 19 S. W. Rep. 61; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. Rep. 76; *Claffin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54; *Peckham v. Hendren*, 76 Ind. 47; *Wilson v. Curry*, 126 Ind. 161, 25 N. E. Rep. 896; *Snyder v. Braden*, 58 Ind. 143; *Landa v. Obert*, 45 Tex. 539; *Waller v. Cralle*, 8 B. Mon. 11; *Holt v. Thomas* (Cal.), 38 Pac. Rep. 891; *Brumagim v.*

*Tillinghast*, 18 Cal. 265; *Kohler v. Wells, &c. Co.* 26 Cal. 606; *Bucknall v. Story*, 46 Cal. 589; *Mayor, &c. v. Lefferman*, 4 Gill, 425.

And this is true even if the claim be an illegal one. *Preston v. City of Boston*, 12 Pick. 7, 12.

In *Brownell v. Talcott*, 47 Vt. 243, a civil process maliciously sued out, which induced one through fear of arrest and imprisonment to make a sale, was held to be duress.

<sup>2</sup> *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. Rep. 272, 57 Am. Rep. 816, per *Walton, J.*

<sup>3</sup> *Buck v. Axt*, 85 Ind. 512; *Edwards v. Bowden*, 107 N. C. 58, 12 S. E. Rep. 58; *Vereycken v. Vandenbrooks* (Mich.), 60 N. W. Rep. 687.

<sup>4</sup> *Whittaker v. Southwest Va. Imp. Co.* 34 W. Va. 217, 12 S. E. Rep. 507.

<sup>5</sup> *Wileox v. Haviland*, 23 Pick. 167; *Grimes v. Briggs*, 110 Mass. 446; *Waller v. Cralle*, 8 B. Mon. 11; *Bunker v. Steward* (Me.), 4 Atl. Rep. 558.

<sup>6</sup> *Thurman v. Burt*, 53 Ill. 129.

avoid a contract induced by threats of the imprisonment of the other, whether such imprisonment would be lawful or unlawful. This is an exception to the general rule that duress which will avoid a contract must be offered to the person who seeks to take advantage of it.<sup>1</sup> Except in the cases mentioned, it is generally held that a deed or contract cannot be avoided by reason of the duress of a third person;<sup>2</sup> though there are a few cases in which it has been held that a deed may be avoided because it was obtained by the duress of a dear friend, or near relative other than a parent or child.<sup>3</sup> The distinction is also taken that, while a threat of lawful arrest and imprisonment of a person justly amenable thereto is not duress when addressed to the person liable to such arrest or imprisonment, yet the same threat made to a wife to obtain the arrest of her husband on a criminal charge, or to a parent to obtain the arrest of his child, does constitute such duress as will serve to vitiate a conveyance if the threat in fact overcomes the will and occasions a forced assent, without reference to the question whether it was or was not a threat of a lawful arrest for adequate cause.<sup>4</sup> "The exception in favor of husband

<sup>1</sup> *Huscombe v. Standing*, Cro. Jac. 187; *Robinson v. Gould*, 11 Cush. 55; *Plummer v. People*, 16 Ill. 358, holding that a surety cannot plead the duress of his principal. *Thompson v. Lockwood*, 15 Johns. 256; *Spaulding v. Crawford*, 27 Tex. 155, holding that one obligor cannot avoid his bond by reason of the duress of his co-obligor.

<sup>2</sup> *Gaines v. Poor*, 3 Met. (Ky.) 503, 79 Am. Dec. 559.

<sup>3</sup> *Sharon v. Gager*, 46 Conn. 189, where an aunt executed a mortgage fearing the imprisonment of her nephew; *Bradley v. Irish*, 42 Ill. App. 85, the case of the duress of a grandparent on account of her grandson, who was also an adopted son; *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. Rep. 946, the duress of a sister whose brother was threatened; *Rau v. Von Zedlitz*, 132 Mass. 164, duress of a woman whose intended husband, on the eve of marriage, was threatened.

<sup>4</sup> *McClintick v. Cummins*, 3 McLean, 158.

*Alabama*: *Holt v. Agnew*, 67 Ala. 360.

*Georgia*: *Small v. Williams*, 87 Ga. 681, 13 S. E. Rep. 589; *Southern Exp. Co. v. Duffy*, 48 Ga. 358. *Illinois*: *Bradley v. Irish*, 42 Ill. App. 85. *Indiana*: *Brooks v. Berryhill*, 20 Ind. 97. *Iowa*: *Smith v. Steely*, 80 Iowa, 738, 45 N. W. Rep. 912; *Singer Manuf. Co. v. Rawson*, 50 Iowa, 634; *Koehler v. Wilson*, 40 Iowa, 183; *Gohegan v. Leach*, 24 Iowa, 509; *First Nat. Bank v. Bryan*, 62 Iowa, 42, 17 N. W. Rep. 165; *Green v. Scranage*, 19 Iowa, 461. *Kansas*: *Winfield Nat. Bank v. Croco*, 46 Kans. 620, 26 Pac. Rep. 939. *Massachusetts*: *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Rau v. Von Zedlitz*, 132 Mass. 164; *Bryant v. Pock*, 154 Mass. 460, 28 N. E. Rep. 678. *Michigan*: *Meech v. Lee*, 82 Mich. 274, 46 N. W. Rep. 383; *Miller v. Minor Lumber Co.* 98 Mich. 163, 57 N. W. Rep. 101. *Missouri*: *Davis v. Luster*, 64 Mo. 43; *McCoy v. Green*, 83 Mo. 626. *Nebraska*: *Beindorff v. Kauffman* (Neb.), 60 N. W. Rep. 101. *New Jersey*: *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. Rep. 8. *New York*: *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. Rep.

and wife is not based solely upon the legal fiction that they are in law one person, but rather upon the nearness and tenderness of the relation. The substantial reasons of the exception apply as strongly to the case of a parent and child as to that of husband and wife. No more powerful and constraining force can be brought to bear upon a man to overcome his will, and extort from him an obligation, than threats of great injury to his child."<sup>1</sup>

In some cases, however, it has been held that, if the debt was actually due and the criminal accusation well-founded, or believed upon reasonable grounds to be so, a mortgage or deed executed by a wife or son under threats of criminal prosecution is not invalid as given under legal duress.<sup>2</sup>

Where a mortgage was executed by a wife to secure the debt

741; 36 Hun, 100; Metropolitan L. Ins. Co. v. Meeker, 85 N. Y. 614; Adams v. Irving Nat. Bank, 116 N. Y. 606, 23 N. E. Rep. 7, 15 Am. St. Rep. 447; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Osborn v. Robbins, 36 N. Y. 365; Haynes v. Rudd, 30 Hun, 237; Strang v. Peterson, 10 N. Y. Supp. 139, 56 Hun, 418. **North Carolina**: Ware v. Nesbit, 94 N. C. 664; Simms v. Barefoot, 2 Hayw. 402. **Ohio**: Western Av. Build. Assn. v. Walters, 7 Ohio C. C. 202. **Pennsylvania**: McGrory v. Reiley, 14 Phila. 111; National Bank v. Kirk, 90 Pa. 49; Jordan v. Elliott (Pa.), 12 Week. N. C. 56. See, however, Fulton v. Hood, 34 Pa. St. 365. **Rhode Island**: Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419. **Tennessee**: Coffman v. Look-out Bank, 5 Lea, 232, 40 Am. Rep. 31. **Wisconsin**: McCormick Harvesting Mach. Co. v. Hamilton, 73 Wis. 486, 41 N. W. Rep. 727; Schultz v. Culbertson, 46 Wis. 313, 1 N. W. Rep. 19, 49 Wis. 122, 4 N. W. Rep. 1070; Schultz v. Catlin, 78 Wis. 611, 47 N. W. Rep. 946, where a sister signed a note because of threats to prosecute a brother for a crime; City Nat. Bank v. Kusworm (Wis.), 59 N. W. Rep. 564.

<sup>1</sup> Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Williams v. Bayley, L. R. 1 H. L. 200. In Bailey v. Williams, 4 Giff. 638, 659, the Vice-Chancellor in the Chancery Court said: "If the fear of the criminal prosecution against the plaintiff's

son, or if the result of the discovery of a criminal act for which the plaintiff was not liable, was used by the defendants against the plaintiff to operate upon his fears, so as to induce him to give a security which would relieve his son from a criminal prosecution, according to the law of this court a security obtained under such circumstances cannot stand. The inequality in the situation of the parties, the one exacting a security which the other is driven to give in order to save his son from exposure, disgrace, and ruin, taints the security obtained under the influence of such fears. If the main and influencing purpose was the relief of the son from the consequences of his crime,—if this was the main consideration operating on the father's mind and was the origin and real cause of the transaction,—the intervention of other circumstances or other collateral advantages to the father will not be enough to justify the court in upholding such a security." See, however, Harmon v. Harmon, 61 Me. 227, 14 Am. Rep. 556.

<sup>2</sup> Smith v. Rowley, 66 Barb. 502; Mundy v. Whittemore, 15 Neb. 647; Green v. Scravage, 19 Iowa, 461, 87 Am. Dec. 447; Gohegan v. Leach, 24 Iowa, 509, an exceptional and peculiar decision. These earlier cases in Iowa seem to be practically overruled in First Nat. Bank v. Bryan, 62 Iowa, 42, 17 N. W. Rep. 165.



of her husband, by reason of threats of criminal proceedings against him under false charges of embezzlement, the fact that the mortgaged property was purchased by the husband with the money of the party making the threats, and fraudulently conveyed to the wife, has no tendency to show the mortgage valid.<sup>1</sup>

### III. *Duress of Property.*

89. Duress of property exists where there is a threat to do some act respecting the property of another which the threatening party has no legal right to do, involving the loss, destruction, or injury of his property. To constitute such duress, there must be some illegal exaction, or some fraud or deception, in regard to such property. The restraint must be imminent, and such as to destroy free agency in a mind of ordinary firmness without present means of protection.<sup>2</sup> There is no duress where the threat in regard to property is to do something which the party threatening has a legal right to do;<sup>3</sup> or to do something which he manifestly

<sup>1</sup> *Singer Manuf. Co. v. Rawson*, 50 Iowa, 634. See, however, *Smith v. Rowley*, 66 Barb. 502.

<sup>2</sup> *Astley v. Reynolds*, 2 Strange, 915; *Oates v. Hudson*, 6 Exch. 346; *Close v. Phipps*, 7 Man. & G. 586; *United States v. Huckle*, 16 Wall. 414; *Robertson v. Frank*, 132 U. S. 17, 10 Sup. Ct. Rep. 5. **Colorado**: *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. Rep. 21, 7 Am. St. Rep. 202. **Georgia**: *Crawford v. Cato*, 22 Ga. 594. **Illinois**: *Pemberton v. Williams*, 87 Ill. 16; *Spaids v. Barrett*, 57 Ill. 484, 11 Am. Rep. 10. **Maine**: *Chamberlain v. Reed*, 13 Me. 357, 29 Am. Dec. 506. **Maryland**: *Central Bank v. Corland*, 18 Md. 305, 81 Am. Dec. 597. **Massachusetts**: *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367; *McMurtrie v. Keenan*, 109 Mass. 185. **Michigan**: *Hackley v. Headley*, 45 Mich. 569, 8 N. W. Rep. 511. **New York**: *Foshay v. Ferguson*, 5 Hill, 154; *Peyser v. Mayor*, 70 N. Y. 497, 26 Am. Rep. 624; *Scholey v. Mumford*, 60 N. Y. 498; *Briggs v. Boyd*, 56 N. Y. 289; *Gates v. Dundon*, 18 N. Y. Supp. 149. **Pennsylvania**: *Heysham v. Dettre*, 89 Pa. St. 506; *Miller v. Miller*, 68 Pa. St. 486; *White v. Heylman*, 34 Pa. St. 142; *Motz v. Mitchell*, 91 Pa. St. 114.

**South Carolina**: *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Bay, 211, 1 Am. Dec. 643. **Wisconsin**: *York v. Hinkle*, 80 Wis. 624, 50 N. W. Rep. 895, 27 Am. St. Rep. 73; *Macloon v. Smith*, 49 Wis. 200, 5 N. W. Rep. 336.

That there is no duress of property sufficient to avoid a deed or contract, see *Shep. Touch.* 61; *Coke*, 2 Inst. 483; *Skeate v. Beale*, 11 Ad. & El. 983, 990; *Bingham v. Sessions*, 14 Miss. 13; *Hazlerigg v. Donaldson*, 2 Met. (Ky.) 445; *Edwards v. Handley*, *Hardin* (Ky.), 602, 3 Am. Dec. 745.

<sup>3</sup> *Skeate v. Beale*, 11 Ad. & El. 983; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. Rep. 511, 21 Am. L. Reg. N. S. 109; *Preston v. Boston*, 12 Pick. 714; *Zents v. Shaner* (Pa.), 7 Atl. Rep. 197; *Burke v. Gould* (Cal.), 38 Pac. Rep. 733, per *Searles, J.*: "The whole question is in a nutshell. To pursue or threaten to pursue the usual legal steps for the collection of a debt in the manner provided by law does not constitute duress of property." And see *Kohler v. Wells*, 26 Cal. 606. In *Buck v. Axt*, 85 Ind. 512, which was an action to foreclose a mortgage executed by *Buck* and wife to secure an antecedent debt owing

has no power to do, and the threatened act would be wholly ineffectual.<sup>1</sup> Money paid by a mortgagee in excess of the amount due on the mortgage, to stop foreclosure proceedings, is a voluntary payment, and not one made under duress.<sup>2</sup>

A deed of trust between husband and wife settling certain property belonging to the wife upon the husband, executed by her on competent advice, cannot be set aside for duress of goods by reason of his having held property which she asserts was hers, and of which she desired to recover as much as possible, it appearing that she had conveyed such property to him through a third person, and her testimony that such conveyance was a fraud on her being contradicted.<sup>3</sup>

#### IV. *Defence and Proof of Duress.*

90. It is no defence that a deed was procured by threats if the grantee was ignorant of the fact, and the threats were made by a third person who was not in any way the agent of the grantee; as for instance where, without the knowledge of the grantee, a husband had induced his wife by threats to execute

by the husband, the wife pleaded duress, and averred she executed the mortgage under a threat that if she refused "they would sell her out of house and home, and Frazier would prosecute her at once." The court, in holding the allegation of duress insufficient, said: "The threats alleged were not such as to constitute duress. The evident meaning of the threats used was that Frazier would at once seek his legal remedies against her and her husband, and so sell them out of house and home; and if more than this was meant, the facts should have been alleged to show it."

<sup>1</sup> *Wills v. Austin*, 53 Cal. 152.

<sup>2</sup> *Vereycken v. Vandenbrooks* (Mich.), 60 N. W. Rep. 687. *Montgomery, J.*, said: "Some courts have held that there can be no duress of real property which remains in the possession of the payor, but most courts hold the contrary. *State v. Nelson*, 41 Minn. 25, 42 N. W. Rep. 548; *Pemberton v. Williams*, 87 Ill. 15; *White v. Heylman*, 34 Pa. St. 142; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. Rep. 217. So it has

been held that, if the mortgagee of land require that the mortgagor pay more than is legally due, for the purpose of preventing a foreclosure by advertisement, this is such a compulsory payment as entitles the party to sue and recover back the excess. But it is to be noted that in such a case the mortgagee, by his own act, unaided by any process of court, has it within his power to deprive the mortgagor of his title. Such was not the case here. All that the plaintiff had done was to file a bill to obtain a decree of the court fixing the amount due. Before any decree could pass against the present plaintiff, he was entitled to his day in court. Under these circumstances, we think there was no duress of property such as the law recognizes. See *Forbes v. Appleton*, 5 Cush. 115; *Benson v. Monroe*, 7 Cush. 125; *Taylor v. Board*, 31 Pa. St. 73; *Oceanic Steamship Co. v. Tappan*, 16 Blatchf. 296, Fed. Cas. No. 10,405; *Mariposa Co. v. Bowman*, Deady, 228, Fed. Cas. No. 9,089.

<sup>3</sup> *Chase v. Phillips*, 153 Mass. 17, 26 N. E. Rep. 136.

the deed.<sup>1</sup> The mortgagee has, however, been held responsible for the husband's acts in such case, on the ground that he had allowed the husband to act as his agent.<sup>2</sup>

91. A bona fide purchaser for value from the grantee in a deed obtained through duress of the grantor is not affected by such duress. Duress and fraud are causes for annulling a deed procured thereby only between the parties, or against subsequent purchasers having notice.<sup>3</sup> But a purchaser who has knowledge that the deed was procured by duress, or has not paid in good faith actual consideration therefor, is in no better condition than the original grantee to resist the avoidance of the deed.<sup>4</sup>

92. The proof of duress must be clear. The evidence must be such that a conclusion of duress must inevitably follow. It is not enough that the facts lead to a strong inference of duress. The testimony of the grantor in contradiction of other witnesses is not sufficient to prove that the execution of the deed was not voluntary.<sup>5</sup> It must be shown that the duress was effective in the particular transaction under consideration. To render the deed of a wife invalid for duress on the part of her husband, it is not sufficient to prove that he was a violent, turbulent, and intemperate man in his habits; that he was domineering towards his wife; that she was afraid of him, and was in the habit of

<sup>1</sup> *Fairbanks v. Snow*, 145 Mass. 153, 261; *Deputy v. Stapleford*, 19 Cal. 302; 154, 13 N. E. Rep. 596, per Holmes, J.; *Cook v. Moore*, 39 Tex. 255; *Wood v. Morse v. Woodworth*, 155 Mass. 233, 29 N. E. Rep. 525, per Knowlton, J.; *Fightmaster v. Levi* (Ky.), 17 S. W. Rep. 195; *Thompson v. Niggle*, 53 Kans. 664, 35 Pac. Rep. 290; *Rogers v. Adams*, 66 Ala. 600; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Comegys v. Clarke*, 44 Md. 108; *Central Bank v. Copeland*, 18 Md. 305; *Lefebvre v. Dutruit*, 51 Wis. 326, 8 N. W. Rep. 149, 37 Am. Rep. 833; *Ætna L. Ins. Co. v. Franks*, 53 Iowa, 618, 6 N. W. Rep. 9; *Line v. Blizzard*, 70 Ind. 23; *Cook v. Moore*, 39 Tex. 255.

<sup>2</sup> *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597.

<sup>3</sup> *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. Rep. 967; *Brown v. Peck*, 2 Wis. 261; *Deputy v. Stapleford*, 19 Cal. 302; *Cook v. Moore*, 39 Tex. 255; *Wood v. Craft*, 85 Ala. 260, 4 So. Rep. 649. See, however, *Belote v. Henderson*, 5 Coldw. 471, 98 Am. Dec. 432.

<sup>4</sup> *Osborn v. Robbins*, 36 N. Y. 365; *Brown v. Peck*, 2 Wis. 261, 279; *Goodrich v. Cushman*, 34 Neb. 460, 51 N. W. Rep. 1041; *McCandless v. Engle*, 51 Pa. St. 309.

<sup>5</sup> *Insurance Co. v. Nelson*, 103 U. S. 544; *Snyder v. Snyder*, 95 Mich. 51, 54 N. W. Rep. 721; *Feller v. Green*, 26 Mich. 70; *Lefebvre v. Dutruit*, 51 Wis. 326, 37 Am. Rep. 833; *Holt v. Agnew*, 67 Ala. 360; *Post v. First Nat. Bank*, 138 Ill. 559, 28 N. E. Rep. 978; *Brower v. Callender*, 105 Ill. 88; *Hamilton v. Smith*, 57 Iowa, 15, 10 N. W. Rep. 276; *Davis v. Fox*, 59 Mo. 125.

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obeying all his commands.<sup>1</sup> It must be shown that the duress was effective at the time of the execution of the conveyance, the validity of which is called in question.<sup>2</sup>

The burden of proof is upon the party who seeks to set aside a conveyance on account of duress.<sup>3</sup> Thus, in an action brought by a married woman to set aside a mortgage of her property to trustees of a land society to secure moneys which had been misappropriated by her husband, who was the secretary of the society, on the ground that the security was given under threats of a criminal prosecution against her husband, it was held that the burden was on the plaintiff to prove pressure or undue influence.<sup>4</sup>

After a delay of several years by the grantor before taking action to set aside a deed obtained from him by duress, it requires undoubted and conclusive evidence of such duress to induce a court of equity to interfere.<sup>5</sup>

V. *Duress renders Deed voidable only.*

93. If the duress consists of threats only, the deed is not void but merely voidable.<sup>6</sup> Such duress is distinguished from the case where the grantor's signing and delivering of the instrument are not his acts, as, for instance, where the signing and delivering are compelled by actual physical force. Duress by imprisonment, when used to procure the execution of a deed, may make it void; but the statement of the rule by Sheppard needs qualification.<sup>7</sup>

94. A deed given under duress may be ratified and made

<sup>1</sup> Freeman v. Wilson, 51 Miss. 329. And see Insurance Co. v. Nelson, 103 U. S. 544.

<sup>2</sup> Jackson v. Ashton, 11 Pet. 229; Fisk v. Stubbs, 30 Ala. 335.

<sup>3</sup> Insurance Co. v. Nelson, 103 U. S. 544.

<sup>4</sup> McClatchie v. Haslam, 65 L. T. Rep. (N. S.) 691, 63 L. T. Rep. (N. S.) 376, 17 Cox Crim. Cas. 402. See, also, Barrett v. Weber, 125 N. Y. 18, 25 N. E. Rep. 1068.

<sup>5</sup> Davis v. Fox, 59 Mo. 125.

<sup>6</sup> Eberstein v. Willets, 134 Ill. 101, 24 N. E. Rep. 967; Fairbanks v. Snow, 145 Mass. 153, 155, 13 N. E. Rep. 596, 1 Am. St. Rep. 446, per Holmes, J.: "We know

of no distinct adjudication of binding authority that mere threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them." Lyon v. Waldo, 36 Mich. 345, court equally divided.

<sup>7</sup> Touchstone, 61: "A deed, therefore, . . . that is made or obtained by menace or duress, i. e., when one doth threaten another to kill or maim him if he will not make him such a deed, or doth imprison another until he make him such a deed, and thereupon he make the deed, — a deed thus obtained by force and through fear, to avoid danger, is void, and will not bind him that made it, nor avail him to whom it is made."

valid by the acts of the grantor after his release from duress.<sup>1</sup> Where a person arrested for larceny conveys land to a person causing his arrest in satisfaction for the stolen property, after being released from arrest, and, having consulted with counsel, surrenders possession of the property conveyed, this constitutes a ratification of the conveyance.<sup>2</sup>

A deed by a wife executed under duress, by threats of a criminal prosecution against the grantor's husband for embezzlement from the grantees, is not void but voidable, and is ratified by the wife when, with full knowledge of its invalidity, and of the fact that her husband has escaped to a foreign country and is beyond the reach of a criminal prosecution, she voluntarily executes another deed to the grantees to induce them to purchase a lot of household furniture on the premises.<sup>3</sup>

The grantor may allow the deed to stand if he chooses. The privilege of avoiding it is a personal one, and cannot be availed of by the grantor's creditors or by any stranger.<sup>4</sup>

95. One who seeks to avoid a deed on account of duress must not sleep upon his rights, but must move promptly. Clear and conclusive evidence in explanation of the delay is required.<sup>5</sup> Long delay raises a presumption of acquiescence and ratification, and when unexplained may have the effect of defeating a recovery of the land. Thus, an unexplained delay of three years in bringing suit to set aside a deed alleged to have been obtained by duress, during which time the property has passed into the hands of innocent purchasers, has been held to bar the right to sue.<sup>6</sup>

<sup>1</sup> *Ormes v. Beadel*, 2 De G., F. & J. 333; *ler v. Minor Lumber Co.* 98 Mich. 163, 57 N. W. Rep. 101; *Heckman v. Swartz*, 50 Wis. 267, 6 N. W. Rep. 891; *Doolittle v. McCullough*, 7 Ohio St. 299; *Reed v. Exum*, 84 N. C. 430, 432, per Smith, C. J.; *Murphy v. Paynter*, 1 Dill. 333. In *Murphy v. Paynter* a bill to set aside a deed for duress was dismissed for an unexplained delay of twelve years.

<sup>2</sup> *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. Rep. 967.

<sup>3</sup> *Miller v. Minor Lumber Co.* 98 Mich. 163, 57 N. W. Rep. 101. And see *Edwards v. Bowden*, 103 N. C. 50, 9 S. E. Rep. 194, 6 Am. St. Rep. 487.

<sup>4</sup> *Lewis v. Bannister*, 16 Gray, 500; *McClintick v. Cummins*, 3 McLean, 158; *Thompson v. Lockwood*, 15 Johns. 256.

<sup>5</sup> *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. Rep. 967; *Lyon v. Waldo*, 36 Mich. 345; *Hunt v. Hardwick*, 68 Ga. 100; *Mil-*

<sup>6</sup> *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. Rep. 967. See, also, *Bouldin v. Reynolds*, 58 Md. 491; *Lefebvre v. Duitruit*, 51 Wis. 326, 8 N. W. Rep. 149, 37 Am. Rep. 833, a delay of two years was declared to be not without significance, but not to be a controlling fact.

In Massachusetts such a deed may be avoided by the entry of the grantor or his heirs within twenty years.<sup>1</sup>

96. When a court of equity sets aside a deed executed under duress, it will compel a reconveyance upon terms just to both parties. In a case where there had been a delay of fourteen years, the court said:<sup>2</sup> "All that the plaintiff is entitled to is the restoration of his land in the state in which it was taken from him, with compensation for the use meanwhile, and for any damages it may have sustained. On the other hand, its increase of value from improvements is a proper counter-claim against the wronged owner. But this counter-claim should be discharged from the earlier annual rents, as well as the purchase-money paid; and when the successive rents have absorbed the amount of these demands of the defendant, the remaining rents of the land as improved (not barred by the statute of limitations) will be the measure of the plaintiff's recovery. This increased rent is given because the improvements will then have been discharged out of the plaintiff's funds."

<sup>1</sup> *Worcester v. Eaton*, 13 Mass. 371, 7    <sup>2</sup> *Reed v. Exum*, 84 N. C. 430, 433.  
Am. Dec. 155.

## CHAPTER VI.

### DISABILITY FROM UNDUE INFLUENCE.

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| <p>I. What constitutes undue influence, 97-102.</p> <p>II. Confidential relation of the parties, 103-107.</p> <p>III. Relation of parent and child, 108-111.</p> | <p>IV. Relation of husband and wife, 112, 113.</p> <p>V. Presumption and proof of undue influence, 114-116.</p> <p>VI. Deed procured by undue influence is voidable only, 117, 118.</p> |
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#### I. *What constitutes undue Influence.*

**97.** Undue influence means wrongful influence. The influence which will render a conveyance voidable is of such a nature as to deprive the grantor of his free agency. If the influence, however exerted, has the effect to control the grantor's volition and to induce him to do what he otherwise would not have done, it is undue or wrongful, and may be taken advantage of by the grantor himself, or by others injuriously affected, to have the deed set aside.<sup>1</sup> "Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents any true consent in the making of a contract or execution of deed, equity may relieve against the same on the ground of undue influence."<sup>2</sup>

<sup>1</sup> Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. Rep. 1001; Ralston v. Turpin, 129 U. S. 663, 25 Fed. Rep. 7; Burt v. Quisenberry, 132 Ill. 385, 24 N. E. Rep. 622; Sturtevant v. Sturtevant, 116 Ill. 340; Yoe v. McCord, 74 Ill. 33, relating to a will; Webber v. Sullivan, 58 Iowa, 260, 12 N. W. Rep. 319; Davis v. Calvert, 5 Gill & J. 269, 302, relating to a will; Kithcart v. Larimore, 34 Neb. 273, 51 N. W. Rep. 768; Smith, *in re*, 95 N. Y. 516; Eckert v. Flowry, 43 Pa. St. 46, relating to a will; Chappell v. Trent (Va.), 19 S. E. Rep. 314, relating to a will.

Undue influence is defined by statute in California, Civ. Code, § 1575: "1. In

the use by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." And see Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. Rep. 4.

<sup>2</sup> Munson v. Carter, 19 Neb. 293, 27 N. W. 208, approved and followed in Hartnett v. Hartnett (Neb.), 60 N. W. Rep. 362. And see Edwards v. Bowden, 107 N. C. 58, 12 S. E. Rep. 58.

Where any relation exists by virtue of which one person is able to exercise dominion over another, the court will annul a transaction under which a person possessing that power takes a benefit, unless he can show the transaction was a righteous one.<sup>1</sup> Thus, where a young woman transferred her property to her intended husband, who had no affection for her, and refused to marry her on any terms other than an absolute conveyance to him of all her property, and her letters showed an infatuation on her part which might impel her to give him all her estate free from any conditions, the transfer was not sustained.<sup>2</sup>

The influence usually denominated undue influence is a wrongful influence upon the mind and will of a person through persuasion and artful effort, so that the will is controlled and the person is constrained to act in subjection to the will of another. When this influence is obtained by physical coercion, or by threats of personal harm, it is usually called duress. "Influence properly gained, although used for a selfish purpose and to obtain an unjust and unfair advantage, will not avoid a deed thereby obtained, unless there is fraud or duress, or the influence is exerted by a stronger mind over a weak one, in such a manner and to such a degree as to substitute the will of the person exerting the influence in place of that of him upon whom it is exerted, so that the latter is no longer a free agent."<sup>3</sup> Moderate solicitation by one to induce another to execute a deed in favor of the former, even when accompanied with tears, does not constitute undue influence.<sup>4</sup>

**98. Evidence and presumptions.**—Where no confidential relation exists between the parties and the grantor's capacity is undoubted, the fact of undue influence must be established by satisfactory evidence; and until so established the ordinary presumption attaches as to the validity of the deed, and the disposing capacity of the grantor; and, on proof of due and proper execution of the instrument, the burden is on the attacking party to

<sup>1</sup> *Cooke v. Lamotte*, 15 Beav. 234.

<sup>2</sup> *Shaw v. Shaw*, 9 N. Y. Supp. 897.

<sup>3</sup> *Howe v. Howe*, 99 Mass. 88, per Hoar, J. See, also, *Conley v. Nailor*, 118 U. S. 127, 134, 6 Sup. Ct. Rep. 1001; *Ralston v. Turpin*, 129 U. S. 663, 9 Sup. Ct. Rep.

6 N. E. Rep. 428; *In re Carroll*, 50 Wis.

437, 7 N. W. Rep. 434; *Carty v. Connolly*,

91 Cal. 15, 27 Pac. Rep. 599; *Millican v. Millican*, 24 Tex. 427; *Simmerman v. Songer*, 29 Gratt. 9, 24.

<sup>4</sup> *Doran v. McConlogue*, 150 Pa. St. 98, 24 Atl. Rep. 357.



prove his case.<sup>1</sup> The allegation of undue influence is tantamount to an allegation of fraud. It is an affirmative fact that must be proved by the party alleging it.<sup>2</sup> "What constitutes undue influence is a question depending upon the circumstances of each particular case. It is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded. But it is evident that its exercise may be inferred in all cases of confidential or quasi-confidential relationship, where the power of the person receiving a gift or other like benefit has been so exerted upon the mind of the donor as, by improper arts or circumvention, to have induced him to confer the benefaction contrary to his deliberate judgment, reason, and discretion."<sup>3</sup> Whether a deed was procured by undue influence may properly be shown by proof of the circumstances attending the transaction;<sup>4</sup> and evidence of other transactions between the parties, not connected with or relating to the transaction in question, but occurring at about the same time, is admissible as bearing upon the relation of trust and confidence existing between them.<sup>5</sup> A deed is not invalidated by evidence of declarations by the grantor that he did not execute the deed willingly or voluntarily. Such evidence is not competent and should be wholly excluded.<sup>6</sup>

99. Weakness of mind furnishes ground of suspicion of improper influence, and therefore, if any unfair advantage over a grantor can be shown or inferred from the circumstances of the transaction, a court of equity will afford relief against it.<sup>7</sup> If the

<sup>1</sup> *Jones v. Jones*, 137 N. Y. 610, 33 N. E. Rep. 479, affirming 17 N. Y. Supp. 905; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. Rep. 331; *Arnold v. Whitcomb*, 83 Mich. 19, 46 N. W. Rep. 1029; *Hamilton v. Armstrong (Mo.)*, 25 S. W. Rep. 545; *Ireland v. Geraghty*, 15 Fed. Rep. 35; *Kopp v. Gunther*, 95 Cal. 63, 30 Pac. Rep. 301.

<sup>2</sup> *Roe v. Taylor*, 45 Ill. 485; *Guild v. Hull*, 127 Ill. 523, 20 N. E. Rep. 665; *Taylor v. Crockett (Mo.)*, 27 S. W. Rep. 620; *Le Gendre v. Goodridge*, 46 N. J. Eq. 419, 19 Atl. Rep. 543.

<sup>3</sup> *Shipman v. Furniss*, 69 Ala. 555, 565, 44 Am. Rep. 528, per Somerville, J.

<sup>4</sup> *Graham v. Burch*, 44 Minn. 33, 46 N. W. Rep. 148; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. Rep. 275; *Drake's Appeal*, 45 Conn. 9; *Tyler v. Gardiner*, 35 N. Y. 559, 594.

<sup>5</sup> *Jones v. Jones*, 120 N. Y. 589, 24 N. E. Rep. 1016; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. Rep. 275.

<sup>6</sup> *Dickie v. Carter*, 42 Ill. 377, 389; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. Rep. 622; *Guild v. Hull*, 127 Ill. 523, 20 N. E. Rep. 665.

<sup>7</sup> *Allore v. Jewell*, 94 U. S. 506; *Harding v. Handy*, 11 Wheat. 103, 2 Mason, 378. In *Harding v. Handy*, 2 Mason, 378, 386, Story, J., said: "Extreme weak-

consideration was inadequate, and the grantee occupied a situation of confidence or authority with respect to the grantor, the deed will not be allowed to stand.<sup>1</sup> The unnaturalness and injustice in

ness will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet, if it should appear to be of such nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it." **California**: *Carty v. Connolly*, 91 Cal. 15, 27 Pac. Rep. 599; *Richards v. Donner*, 72 Cal. 207, 13 Pac. Rep. 584. **Delaware**: *Guest v. Beeson*, 2 Houst. 246. **Georgia**: *Frizzell v. Reed*, 77 Ga. 724; *Causey v. Wiley*, 27 Ga. 444. **Indiana**: *Ashmead v. Reynolds*, 134 Ind. 139, 33 N. E. Rep. 763, 127 Ind. 441, 26 N. E. Rep. 80; *Wray v. Wray*, 32 Ind. 126; *Ikerd v. Beavers*, 106 Ind. 483, 7 N. E. Rep. 326. And see *Jagers v. Jagers*, 49 Ind. 428. **Iowa**: *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Marmon v. Marmon*, 47 Iowa, 121; *Harris v. Wamsley*, 41 Iowa, 671; *Oakey v. Ritchie*, 69 Iowa, 69, 28 N. W. Rep. 448; *Spargur v. Hall*, 62 Iowa, 498, 17 N. W. Rep. 743. **Kentucky**: *Hounshell v. Sams* (Ky.), 9 S. W. Rep. 410. **Michigan**: *Case v. Case*, 26 Mich. 484; *Warttemberg v. Spiegel*, 31 Mich. 400; *Crips v. Towsley*, 73 Mich. 395, 41 N. W. Rep. 332. **Missouri**: *Crowe v. Peters*, 63 Mo. 429; *Turner v. Turner*, 44 Mo. 535; *Bowles v. Wathan*, 54 Mo. 261. **Nebraska**: *Mulloy v. Ingalls*, 4 Neb. 115; *Cole v. Cole*, 21 Neb. 84, 31 N. W. Rep. 493. **New Hampshire**: *Dennett v. Dennett*, 44 N. H. 531, 538, 84 Am. Dec. 97, per Bell, C. J. **New Jersey**: *Mead v. Coombs*, 26 N. J. Eq. 173; *Collins v. Collins* (N. J. Eq.), 15 Atl. Rep. 849; *Martling v. Martling*, 47 N. J. Eq. 122; *Morton v. Morton* (N. J. Eq.), 8 Atl. Rep. 807. **New York**: *Jackson v. King*, 4 Cow. 216, 15 Am. Dec. 354. **Rhode**

**Island**: *Anthony v. Hutchins*, 10 R. I. 165, 176. *Brayton, C. J.*, said: "It is not sufficient to suggest mere weakness or indiscretion of the party, unless it also be shown that there was fraud in the party contracting, or some undue means made use of to induce the agreement and control that weakness. The degree of mental weakness may be below that which would justify a commission of lunacy, or the appointment of a guardian, if it has been taken advantage of for the purpose. The cause of the weakness is not material. It may be from duress, general imbecility, accidental depression, constitutional dependency, or the result of sudden fear or apprehension." **South Carolina**: *Bunch v. Hurst*, 3 Deasus. (Eq.) 273, 5 Am. Dec. 551. **Texas**: *Beville v. Jones*, 74 Tex. 148, 11 S. W. Rep. 1128. **Washington**: *Kennedy v. Currie*, 3 Wash. St. 442, 28 Pac. Rep. 1028. **Wisconsin**: *Encking v. Simmons*, 28 Wis. 272; *Davis v. Dean*, 66 Wis. 100, 26 N. W. Rep. 737.

<sup>1</sup> *Kempson v. Ashbee*, L. R. 10 Ch. 15; *Osmond v. Fitzroy*, 3 P. Wms. 130; *Wright v. Proud*, 13 Ves. 138; *Huguenin v. Baseley*, 14 Ves. 273; *Dent v. Burnett*, 4 Myl. & C. 269; *Harvey v. Mount*, 8 Beav. 439; *Taylor v. Taylor*, 8 How. 183; *Jenkins v. Pye*, 12 Pet. 241. **Alabama**: *Waddell v. Lanier*, 62 Ala. 347. **California**: *Klose v. Hillenbrand*, 88 Cal. 473, 26 Pac. Rep. 352; *Moore v. Moore*, 81 Cal. 195, 22 Pac. Rep. 589. **Georgia**: *Frizzell v. Reed*, 77 Ga. 724. **Iowa**: *Clough v. Adams*, 71 Iowa, 17, 32 N. W. Rep. 10; *Gardner v. Lightfoot*, 71 Iowa, 577, 32 N. W. Rep. 510. **Maryland**: *Highberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593; *Cherbonnier v. Evitts*, 56 Md. 276. **Massachusetts**: *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. Rep. 275. **Michigan**: *Hemphill v. Holford*, 88 Mich. 293, 50 N. W. Rep. 300; *Smith v. Smith*, 90 Mich. 97, 51 N. W. Rep. 361. **Minnesota**: *Graham v. Burch*, 44 Minn. 33, 46 N. W. Rep.

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the transaction may be enough to make a fair preponderance of evidence on the side of the grantor's incompetency.<sup>1</sup> The fact that a grantor of weak mind, in making a conveyance for an inadequate consideration, acted without independent advice, is a circumstance that will be taken into account in interfering to set aside the sale.<sup>2</sup>

100. When mental weakness on the part of the grantor is shown, his voluntary conveyance can be sustained only upon affirmative evidence that the conveyance was not procured by any undue influence. A voluntary conveyance by a father of substantially all his property to his daughter to the exclusion of his other children will be set aside, where it is shown that the grantor's weakness of mind was extreme, and that in other business transactions he was wholly controlled by the grantee. Such a conveyance could only be sustained by affirmative evidence that it was made without the exercise of any influence on the part of the grantee or in her behalf to procure it, and that the grantor fully understood the legal effect of his act.<sup>3</sup> A deed by an aged and infirm woman in consideration of love and affection to all her children except one daughter, in whose favor she expressed a desire to make some provision, but was overborne by the influence of some of the children in whose care she was, and who were at enmity with this daughter's husband, was properly set aside as procured by undue influence.<sup>4</sup>

101. Though the grantor was of great age, if he was fully competent to transact all his business, and capable of a rational disposition of his property, a voluntary conveyance will not be set

148. **New York:** *Fisher v. Fisher*, 9 N. Y. Supp. 4. **North Carolina:** *Futrill v. Futrill*, 5 Jones Eq. 61. **Pennsylvania:** *Arnold v. Townsend*, 14 Phila. 216. **South Carolina:** *Sims v. McLure*, 8 Rich. Eq. 286, 70 Am. Dec. 196; *Gaston v. Bennett*, 30 S. C. 467, 9 S. E. Rep. 515. **Texas:** *Millican v. Millican*, 24 Tex. 426. **Virginia:** *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. Rep. 575. **Wisconsin:** *Kelly v. Smith*, 73 Wis. 191, 41 N. W. Rep. 69; *Konrad v. Zimmerman*, 79 Wis. 306, 48 N. W. Rep. 368.

<sup>1</sup> *Hemphill v. Holford*, 88 Mich. 293, 50 N. W. Rep. 300; *Paddock v. Pulsifer*, 43 Kans. 718, 23 Pac. Rep. 1049.

<sup>2</sup> *Allore v. Jewell*, 94 U. S. 506; *Kempson v. Ashbee*, L. R. 10 Ch. 15; *Peebles v. Horton*, 64 N. C. 374; *Potter v. Woodruff*, 92 Mich. 8, 52 N. W. Rep. 83.

<sup>3</sup> *Fitch v. Reiser*, 79 Iowa, 34, 44 N. W. Rep. 214; *Norton v. Norton*, 74 Iowa, 161, 37 N. W. Rep. 129; *Paddock v. Pulsifer*, 43 Kans. 718, 23 Pac. Rep. 1049; *Clark v. Kirkpatrick* (N. J. Eq.), 16 Atl. Rep. 309; *Smith v. Smith*, 90 Mich. 97, 51 N. W. Rep. 361.

<sup>4</sup> *Miller v. Murfield*, 79 Iowa, 64, 44 N. W. Rep. 540.

aside on the ground of a presumption of improper influence.<sup>1</sup> "While extreme age will not authorize the presumption of a want of mind or of mental power sufficient to enable one to conduct his business affairs, the chancellor will always scrutinize with vigilance the character of the transactions resulting in voluntary donations or grants to those who are likely, from their surroundings, to have exercised an influence over the aged and infirm when thus disposing of their estate."<sup>2</sup> Evidence that a daughter in various ways directed and controlled the actions of her aged father, whose mind was not as vigorous as it had been, and whose intimacy with a married woman in the neighborhood was distasteful to his wife and other members of the family, but was approved by his daughter, who spoke of her mother and the others in unfriendly terms, is sufficient to justify a finding that the deed was procured by undue influence.<sup>3</sup>

102. A conveyance which seems unnatural and unjust towards the grantor's relatives does not of itself afford any ground for impeaching its validity, if the grantor's capacity is undoubted, and there is no ground for presuming undue influence, and there is no proof of such influence. A grantor has the legal right to make an unequal, unjust, unnatural, or unreasonable disposition of his property. It is only when the grantor's capacity is properly questioned, or improper influence is proved or presumed, or his relations to the grantee are confidential or unlawful, that his

<sup>1</sup> *Creswell v. Welchman*, 95 Cal. 359; 347; *Graham v. Burch*, 44 Minn. 33, 46 N. W. Rep. 148; *Martin v. Martin*, 1 N. W. Rep. 622; *Arnold v. Whitcomb*, 83 Mich. 19, 46 N. W. Rep. 1029; *Brockway v. Harrington*, 82 Iowa, 23, 47 N. W. Rep. 1013; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383; *Likins v. Likins* (Mo.), 27 S. W. Rep. 531.

<sup>2</sup> *Sullivan v. Hodgkin* (Ky.), 12 S. W. Rep. 773, per Pryor, J. And see *Peabody v. Kendall*, 145 Ill. 519, 32 N. E. Rep. 674; *Kimball v. Cuddy*, 117 Ill. 213, 7 N. E. Rep. 589; *Hill v. Miller*, 50 Kans. 659, 32 Pac. Rep. 354; *Paddock v. Pulsifer*, 43 Kans. 718, 33 Pac. Rep. 1049; *Weller v. Weller*, 112 N. Y. 655, 19 N. E. Rep. 433, affirming 44 Hun, 172; *Todd v. Grove*, 33 Md. 188; *Higberger v. Stiffler*, 21 Md. 338; *Waddell v. Lanier*, 62 Ala.

347; *Graham v. Burch*, 44 Minn. 33, 46 N. W. Rep. 148; *Martin v. Martin*, 1 N. W. Rep. 622; *Arnold v. Whitcomb*, 83 Mich. 19, 46 N. W. Rep. 1029; *Brockway v. Harrington*, 82 Iowa, 23, 47 N. W. Rep. 1013; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383; *Likins v. Likins* (Mo.), 27 S. W. Rep. 531.

<sup>3</sup> *Peabody v. Kendall*, 145 Ill. 519, 32 N. E. Rep. 674.

disregard of the natural and usual modes of disposing of property is of consequence.<sup>1</sup> The facts and circumstances of the case may fully and satisfactorily explain the conduct of the grantor. Thus, if an only son has for a long time neglected his mother, and has not attempted to treat her as a mother, but she has lived with her nephews, who have kindly cared for her during many years, a conveyance to them of all her real estate, made shortly before her death, to the exclusion of her son, may be properly sustained.<sup>2</sup>

## II. *Confidential Relation of the Parties.*

103. A voluntary conveyance to one who holds a confidential relation to the grantor is looked upon with suspicion, and it is presumed that the grantee obtained the conveyance by the exercise of an influence unduly to his own advantage. Such a conveyance will not be upheld, unless it is shown that the grantor acted under independent advice and fully understood the result and effect of his act. In the words of Lord Langdale,<sup>3</sup> the inequality between the transacting parties is so great "that, without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence." The burden is upon the grantee who receives a conveyance from a person who confides in him, or is under the dominion of his influence, to show that a reasonable use has been made of such confidence or influence.<sup>4</sup> "In many

<sup>1</sup> *Campbell v. Campbell*, 75 Mich. 53, 42 N. W. Rep. 670; *Salisbury v. Aldrich*, 118 Ill. 199, 8 N. E. Rep. 777; *Hale v. Cole*, 31 W. Va. 579, 8 S. E. Rep. 516; *Bledsoe v. Bledsoe* (Ky.), 1 S. W. Rep. 10; *tagnie*, 73 N. Y. 498; *Comstock v. Comstock*, 57 Barb. 453; *Yosti v. Laughran*, 49 Mo. 594; *Munson v. Carter*, 19 Neb. 293, 27 N. W. Rep. 208; *Waddell v. Lannier*, 62 Ala. 347.

<sup>2</sup> *Hale v. Cole*, 31 W. Va. 579, 8 S. E. Rep. 516. And see *Callery v. Miller*, 1 N. Y. Supp. 88.

<sup>3</sup> *Casborne v. Barsham*, 2 Beav. 76. And see *Hoghton v. Hoghton*, 15 Beav. 278; *Rhodes v. Bate*, L. R. 1 Ch. App. 252, per Lord Justice Turner; *Savery v. King*, 5 H. L. Cas. 627; *Parker v. Duncan*, 88 L. T. 326; *Lyon v. Home*, L. R. 6 Eq. Cas. 655; *Miskey's App.* 107 Pa. St. 611; *Watkins v. Brant*, 46 Wis. 419, 1 N. W. Rep. 82; *Boyd v. De La Mon-*

<sup>4</sup> *Parfitt v. Lawless*, L. R. 2 Prob. & D. 468, per Lord Penzance; *Gibson v. Jeyes*, 6 Ves. 278, per Lord Eldon; *Huguenin v. Baseley*, 14 Ves. 273, 300, per Sir Samuel Romilly; *Dent v. Bennett*, 4 Myl. & C. 269, per Lord Cottenham; *Ralston v. Turpin*, 129 U. S. 663, 9 Sup. Ct. Rep. 420. *Alabama*: *Burke v. Taylor*, 94 Ala. 530, 10 S. E. Rep. 129; *Lyons v. Campbell*, 88 Ala. 462, 7 So. Rep. 250; *Shipman v. Furniss*, 69 Ala. 555; *Wood v. Craft*, 85 Ala. 260, 262, 4 So. Rep. 649. *California*: *Ross v. Conway*, 92 Cal. 632, 636, 28 Pac.

cases," said the Master of the Rolls, Romilly, "the court, from the relations existing between the parties to the transaction, infers the probability of such undue influence having been exerted. These are the cases of guardian and ward, of solicitor and client, spiritual instructor and pupil, medical adviser and patient, and the like; and in such cases the court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit: not that the influence itself, flowing from such relations, is either blamed or discountenanced by the court; on the contrary, the due exercise of it is considered useful and advantageous to society; but this court holds, as an inseparable condition, that this influence should be exercised for the benefit of the person subject to it, and not for the advantage of the person possessing it."<sup>1</sup>

104. The confidential relation is not confined to the usual

Rep. 785, per Harrison, J.: "This rule finds its application with peculiar force in a case where the effect of the transaction is to divert an estate from those who, by the ties of nature, would be its natural recipients, to the person through whose influence the diversion is made, whether such diversion be for his own personal advantage, or for the advantage of some interest of which he is the representative. It has been more frequently applied to transactions between attorney and client, or guardian and ward, than to any other relation between the parties; but the rule itself has its source in principles which underlie and govern all confidential relations, and is to be applied to all transactions arising out of any relation in which the principle is applicable." **Connecticut**: *Richmond's App.* 59 Conn. 226, 22 Atl. Rep. 82. **Iowa**: *Spargur v. Hall*, 62 Iowa, 498; *Gardner v. Lightfoot*, 71 Iowa, 577, 32 N. W. Rep. 510. **Kansas**: *Paddock v. Pillsifer*, 43 Kans. 718, 23 Pac. Rep. 1049. **Kentucky**: *McElwain v. Russell* (Ky.), 12 S. W. Rep. 777. **Maryland**: *Todd v. Grove*, 33 Md. 188; *Higberger v. Stiffler*,

21 Md. 338; *Williams v. Williams*, 63 Md. 371. **Michigan**: *Smith v. Cuddy*, 96 Mich. 562, 56 N. W. Rep. 89; *Seeley v. Price*, 14 Mich. 541; *Witbeck v. Witbeck*, 25 Mich. 439; *Wartemberg v. Spiegel*, 31 Mich. 400; *Barnes v. Brown*, 32 Mich. 146; *Duncombe v. Richards*, 46 Mich. 166, 9 N. W. Rep. 149; *Jacox v. Jacox*, 40 Mich. 473; *Finegan v. Theisen*, 92 Mich. 173, 52 N. W. Rep. 619. **Missouri**: *Armstrong v. Logan* (Mo.), 22 S. W. Rep. 384. **New Jersey**: *Pironi v. Corrigan*, 47 N. J. Eq. 135, 20 Atl. Rep. 218 (N. J. L.), 23 Atl. Rep. 355. **New York**: *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. Rep. 331; *Ford v. Harrington*, 16 N. Y. 285; *Freelove v. Cole*, 41 Barb. 318; *Mason v. Ring*, 2 Abb. Pr. N. S. 322; *Ross v. Ross*, 6 Hun, 80; *Marx v. McGlynn*, 88 N. Y. 357. **Pennsylvania**: *Yardley v. Cuthbertson*, 108 Pa. St. 395, 1 Atl. Rep. 765, 56 Am. Rep. 218, relating to a will; *Miskey's App.* 107 Pa. St. 611. **Washington**: *White v. Johnson*, 4 Wash. St. 113, 29 Pac. Rep. 932.

<sup>1</sup> *Hoghton v. Hoghton*, 15 Beav. 278, 299.

relations between persons which are so designated, but embraces every possible fiduciary relation. Lord Kingsdown, in the House of Lords, said: "Equity is especially jealous to guard the welfare of the weaker party in all contracts between parent and child, guardian and ward, attorney and client, trustee and *cestui que trust*, and, indeed, in all persons standing in fiduciary relations to each other. It is especially active and searching with gifts, voluntary conveyances, and deeds without due consideration; though its range is so wide as to cover all possible dealings between persons holding such relations, or any relations in which dominion, whether physical, intellectual, moral, religious, domestic, or of any sort, may be exercised by one party over the other, or in which the parties contracting are not at arm's-length."<sup>1</sup> Confidential relations may exist outside of the usual ones arising from the position of guardian and ward, attorney and client, pastor and churchman, physician and patient, and the like.<sup>2</sup> "The confidential relation is not at all confined to any specific association of the parties to it. While its more frequent illustrations are between persons who are related as trustee and *cestui que trust*, guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and copartners, principal and agent, master and servant, physician and patient, and, generally, all persons who are associated by any relation of trust and confidence. When the relation exists, the consequent duties and obligations are perfectly well established by long-settled law."<sup>3</sup>

But the courts will not interfere to set aside a trifling gift or benefit conferred upon a person standing in a confidential relation to the giver, upon mere proof of the confidential relation, but only in case there is distinct proof of *mala fides*, or of undue exercise of influence.<sup>4</sup>

105. Where the relation is one of special trust, such as

<sup>1</sup> *Smith v. Kay*, 7 H. L. Cas. 750; to be most freely exercised." And see *White & T. Lead. Cas. Eq.* (ed. 1887) *Jones v. Jones*, 137 N. Y. 610, 33 N. E. Rep. 479, affirming 17 N. Y. Supp. 905; 1184.

<sup>2</sup> In the case of *Dent v. Bennett*, 4 Myl. & C. 269, Lord Chancellor Cottenham said: "I will not narrow the rule, or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this court, by any enumeration of the description of persons against whom it ought

<sup>3</sup> *Darlington's Est.* 147 Pa. St. 624, 629, 23 Atl. Rep. 1046, per Green, J.

<sup>4</sup> *Rhodes v. Bate*, L. R. 1 Ch. App. 252, per Turner, L. J.

arises between a trustee and the beneficiary, between guardian and ward, attorney and client, principal and agent, physician and patient, any benefit secured by the first-named party in either of these relations is presumed to have been improperly secured, and it will be sustained only upon satisfactory evidence that it was the free and voluntary act of the other party. In dealings between principal and agent, guardian and ward, trustee and *cestui que trust*, the burden of proof is upon the agent, the guardian, or the trustee, who claims a benefit arising from the transaction, to show the utmost good faith on his part, that he took no advantage of his influence or knowledge, and that he brought everything to the knowledge of the other party which he himself knew.<sup>1</sup> Thus, a provision in a deed of trust which gave a large compensation to the trustees, one of whom was the lawyer who wrote the deed, although the grantor was perfectly competent, was set aside because the compensation was excessive, and affirmative proof was not given that full explanation was made to the grantor of the character and effect of the provision.<sup>2</sup>

A deed by a young man to a woman who had been for some years his nurse and attendant was set aside because the relation was regarded as of a confidential nature, and there was no affirmative proof in support of the conveyance, though the grantor was mentally competent and no undue influence was brought to bear upon him, and he acted under advice.<sup>3</sup>

Of course, if the person holding the relation of trustee, agent, or other place of confidence, purchases with the consent of the party beneficially interested, given with a full knowledge of all the circumstances affecting the purchase, the conveyance will be sustained, though it will be set aside if there was any fraud or unfair advantage taken of the confidential relation.<sup>4</sup>

<sup>1</sup> *Ralston v. Turpin*, 129 U. S. 663; *bury v. Aldrich*, 118 Ill. 199, 8 N. E. Rep. 9 Sup. Ct. Rep. 420; *June v. Willis*, 30 777.

*Fed. Rep.* 11; *Darlington's App.* 86 Pa. St. 512, per *Trunkey, J.*; *Darlington's Est.* 147 Pa. St. 624; *Woodbury v. Woodbury* 141 Mass. 329, 5 N. E. Rep. 275; *Sears v. Hicklin*, 13 Colo. 143, 21 Pac. Rep. 1022; *Tancre v. Reynolds*, 35 Minn. 476; 29 N. W. Rep. 171; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. Rep. 842; *Whipple v. Barton*, 63 N. H. 613, 3 Atl. Rep. 922; *McHarry v. Irvin*, 85 Ky. 322, 4 S. W. Rep. 800, 3 S. W. Rep. 374; *Salis-*

<sup>2</sup> *Greenfield's Est.* 14 Pa. St. 489, per *Bell, J.*: "An attorney or other confidential adviser is not permitted to avail himself either of the necessities of his client, or of his good nature, liberality, or credulity, to obtain undue advantages, bargains, or gratuities."

<sup>3</sup> *Worrall's App.* 110 Pa. St. 349.

<sup>4</sup> *Hawley v. Tesch (Wis.)*, 59 N. W. Rep. 670.



§§ 106, 107.] DISABILITY FROM UNDUE INFLUENCE.

106. If it is shown that a grantee to whom one has made a gift of land had a spiritual ascendancy over the grantor, the burden of proof is shifted upon the grantee to show that the grantor knew the legal effect of the transaction.<sup>1</sup> Thus, where a Roman Catholic woman, old, eccentric, and illiterate, being unable either to read or write, made a will devising certain land to a priest who was her spiritual adviser, which she afterwards revoked, and by deed, reserving to herself a life estate, conveyed the land as a gift to the priest, who thereupon gave her a thousand dollars, to be expended in improving the land, it was held that the burden was on the priest to prove that his grantor was fully apprised of the legal effect of her act when she signed the deed, and that she was not influenced by her confidential relations with him. Because of the failure of such proof, the conveyance was set aside upon the refunding of the money paid by the priest.<sup>2</sup>

107. Where the only relation between the parties is that of friendly habits, or habitual reliance on advice and assistance in some matters, the relation can hardly be called a confidential one, though care must be taken that no undue advantage shall be made of the influence thus acquired. The mere circumstance that a deed of gift is made to a friend of long standing, who has been accustomed to advise the grantor in certain business matters, does not warrant the court in ascribing the deed to undue influence improperly exercised over the grantor, making him the dupe of his friend's artifices, the victim of his contrivances, the subject

<sup>1</sup> *Norton v. Rely*, 2 Eden, 286, where the gift of an annuity obtained by a preacher who had a spiritual ascendancy over the donor, a woman, was set aside upon principles of public policy. And see *Ford v. Hennessy*, 70 Mo. 580.

<sup>2</sup> *Carrigan v. Peroni* (N. J. L.), 23 Atl. Rep. 355, reversing 47 N. J. Eq. 135, 20 Atl. Rep. 218; *Finegan v. Theisen*, 92 Mich. 173, 52 N. W. Rep. 619. For a similar case see *Ross v. Conway*, 92 Cal. 632, 28 Pac. Rep. 785. In this case *Harrison, J.*, said: "That the influence which the spiritual adviser of one who is about to die has over such person is one of the most powerful that can be

exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement; and in any transaction between them, wherein the adviser receives any advantage, a court of equity will not enter into an investigation of the extent to which such influence has been exercised. Any dealing between them, under such circumstances, will be set aside as contrary to all principles of equity, whether the benefit accrue to the adviser, or to some other recipient who, through such influence, may have been made the beneficiary of the transaction."

of his sway.<sup>1</sup> But where a relation of confidence is shown to exist, slight proof of fraud or undue influence will be ground for setting the deed aside.<sup>2</sup> Where deeds of gift were drawn by the husband of one of the grantees, the other being his wife's sister, at the positive direction of the donor, who was an intelligent man with mind unimpaired, though sick at the time, no presumption of invalidity arises from the relation in which the husband stood to the grantor, though, if the husband's conduct in this matter had been tainted with the slightest injustice or wrong-doing, it would have avoided the deed, notwithstanding his wife and her sister were guilty neither of fraud nor any undue influence in procuring the deeds.<sup>3</sup>

The mere relation of master and servant, or of boarder and landlord, raises no implication of a confidential relation which the courts will consider in proceedings in equity to set aside a conveyance.<sup>4</sup>

### III. *Relation of Parent and Child.*

108. The influence of a father over a child is such that if the father takes a voluntary conveyance, or one upon an inadequate consideration, from his son or daughter, the burden of proof is upon him to show that he did not unfairly take advantage of his influence and authority in the transaction.<sup>5</sup> As said by Lord Chancellor Hatherly:<sup>6</sup> "If the father himself takes a benefit, then arises the jealousy of the court, and we have to consider how the child's intention was produced; and even if we find the intention which the instrument describes, still the question arises, how

<sup>1</sup> *Pratt v. Barker*, 1 Sim. 1, 4 Russ. 507, per Lord Brougham; *Hunter v. Atkins*, 3 Myl. & K. 113, per Lord Brougham.

<sup>2</sup> *Bayliss v. Williams*, 6 Coldw. 440.

<sup>3</sup> *Hamilton v. Armstrong*, 120 Mo. 597, 25 S. W. Rep. 545, 20 S. W. Rep. 1054.

<sup>4</sup> *Doran v. McConlogue*, 150 Pa. St. 98, 24 Atl. Rep. 357. It seems, too, that there is no special confidential or fiduciary relation between an officer of a corporation and a person from whom such officer purchases the stock of the corporation. *Krumbhaar v. Griffiths*, 151 Pa. St. 223, 25 Atl. Rep. 64.

<sup>5</sup> *Hoghton v. Hoghton*, 15 Beav. 278; *Bellamy v. Sabine*, 2 Phill. 425, 439, per

*Lord Cottenham*; *Archer v. Hudson*, 7 Beav. 551, per Lord Langdale; *Wycherley v. Wycherley*, 2 Eden, 175, 180, per Lord Northington; *Muzzy v. Tompkinson*, 2 Wash. St. 616, 27 Pac. Rep. 456, 28 Pac. Rep. 652; *Miskey's App.* 107 Pa. St. 611; *Williams v. Williams*, 63 Md. 371; *Knox v. Singmaster*, 75 Iowa, 64; *Toms v. Greenwood*, 9 N. Y. Supp. 666; *Bergen v. Udall*, 31 Barb. 9; *Noble v. Moses*, 74 Ala. 604, 1 So. Rep. 217; *Baldock v. Johnson*, 14 Oreg. 542, 13 Pac. Rep. 434; *Beville v. Jones*, 74 Tex. 148, 11 S. W. Rep. 1128.

<sup>6</sup> *Turner v. Collins*, L. R. 7 Ch. App. 329, 339.

has that intention been produced? Influence is a thing which is assumed as between father and child, not that the influence is assumed to be unduly exercised, but that the influence is assumed; and it is then thrown upon the father, if he takes any benefit, to prove what is called the righteousness of the transaction, and the court has to see that every proper protection was thrown around the child, and that the child has deliberately and advisedly, and under protection, done that by which his father has obtained a benefit."

Where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, a court of equity expects that the father shall be able to justify what has been done; to show, at all events, that the son was really a free agent, that he had adequate independent advice; that he was not taking an imprudent step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it.<sup>1</sup>

Where a man enfeebled in mind and body made a voluntary conveyance of all his estate, worth seventy thousand dollars or more, to his father, for the benefit of his father, his mother, and sister, with the exception of a trust for his wife and son of the sum of ten thousand dollars, and the transaction was made under the professional advice of the father's attorney, without the knowledge of the son's private attorney, the deed was set aside in favor of the grantor's widow.<sup>2</sup>

When a parent takes the benefit of a voluntary conveyance from a child, two things are required to be proved by the parent setting up the deed: first, that the deed is the real deed of the child, and was intended to have the operation which it legally has; and secondly, that such intention was fairly produced.<sup>3</sup>

<sup>1</sup> *Savery v. King*, 5 H. L. Cases, 627, 657. Lord Chancellor Cranworth said: "I must not be understood as questioning the position that a son may give up all or any portion of his property to his father without consideration. Undoubtedly he may do so: but then it is incumbent on the father, accepting such a benefit, to satisfy the court before which the transaction is impeached that the son fully understood what he was doing; that no artifice or contrivance was made use of to induce him to do the act complained of; and that the son had competent means of forming an independent judgment." See, also, *Williams v. Williams*, 63 Md. 371; *Noble v. Moses*, 81 Ala. 530, 1 So. Rep. 217; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. Rep. 918.

<sup>2</sup> *Miskey's App.* 107 Pa. St. 611.

<sup>3</sup> *Hoghton v. Hoghton*, 15 Beav. 278, 302; *Turner v. Collins*, L. R. 7 Ch. App. 329.

109. A deed made by a parent to a child at his solicitation, and because of partiality induced by affection, is not procured by undue influence, because it is not a wrongful influence. A deed made under such influence will not be invalidated on the ground of undue influence, unless the court is convinced that the free agency of the grantor, at the time he executed the deed, was so far destroyed that he would not have made the deed if left to himself.<sup>1</sup> As between parents and children, the law makes no presumption of undue influence which the children are bound to explain in order to obtain the benefit of a voluntary conveyance of property to them. The parental relation alone is enough to rebut any such presumption.<sup>2</sup>

A deed of gift by a mother to her daughters, who execute in return a conveyance to her of a life estate in the same property, will not be set aside on her own application, where the evidence shows that when the deed was made the grantor declared that she made the conveyance so that her daughters might have a home; that there was no exercise of undue influence by the grantees in procuring the execution of the deed; that there was no advantage taken of any confidential relation; and that there was no mental unsoundness or feebleness on the part of the grantor.<sup>3</sup>

When a husband and wife separate, and one son remains with the father, taking his part, sharing his confidence and affection and assisting him in his affairs, and the other children go with the mother, taking her part in the family differences, and this state of things continues for years, until terminated by the death of the father, it is natural and reasonable that the father, in disposing of his estate, should desire to specially provide for the son who remained with him and took his part; and a deed made by him with this object, and under the natural influences springing from such relationship, will be sustained, unless it be made

<sup>1</sup> *Le Gendre v. Goodridge*, 46 N. J. W. Rep. 465; *Carty v. Connolly*, 91 Cal. Eq. 419, 19 Atl. Rep. 543; *Sullivan v.* 15, 27 Pac. Rep. 599; *Burt v. Quisenberry*, Hodgkin (Ky.), 12 S. W. Rep. 773; *Bush* 132 Ill. 385, 24 N. E. Rep. 622; *Hansen v. Johnson* (Ky.), 12 S. W. Rep. 758; *v. Berthelson*, 19 Neb. 433, 27 N. W. Rep. 423.

*Fitz Patrick v. Fitz Patrick*, 91 Mich. 394, 51 N. W. Rep. 1058; *Lynch v. Doran*, 95 Mich. 395, 54 N. W. Rep. 882; *Brockway* Rep. 657, per Green, J.

*v. Harrington*, 82 Iowa, 23, 47 N. W. Rep. <sup>3</sup> *Simon v. Simon* (Pa. St.), 29 Atl. 1013; *Moss v. Moss*, 78 Iowa, 645, 43 N. W. Rep. 657.

further to appear that the son practised upon the father imposition, fraud, importunity, duress, or something of that nature, in order to secure its execution.<sup>1</sup>

Where a woman made a conveyance to the widow of her deceased son of land inherited by the grantor from her son, the evidence showed that the grantor was a woman of ordinary intelligence; that she understood her rights as heir of her son; that she made the conveyance on the advice and solicitation of her daughter, who pressed upon her the claims of her son's wife to all the property acquired by the son; and that there was no deception used. It was held that there was no ground for annulling the deed on the ground of undue influence.<sup>2</sup>

110. It is true, nevertheless, that the natural position of parent and child may become changed, and the parent may become subject to the dominion of the child to such an extent that any deed of gift from the parent to the child will be viewed with great suspicion and set aside, unless satisfactory evidence is produced that the deed was not obtained by wrongful influence. When it is once shown that this influence exists, there is a presumption of its continuance, and the burden of proof will be upon the child to show that it did not exist at the time of the deed of gift.<sup>3</sup> Where a son has maintained a long intimacy with his father, and has had the management of his affairs, a confidential relation between the father and son is induced, which, resembling that between client and attorney, principal and agent, parishioner and priest, compels proof of a valuable consideration and *bona fides* in order to sustain a deed from one to the other.<sup>4</sup>

A father, according to a long-fixed and often-expressed intention, conveyed a part of his land to his natural daughter, to whom he was deeply attached. His legitimate daughter and her husband importuned him, with threats, to have the land reconveyed to him. He thereupon went, with the counsel of his son-in-law, to the first-mentioned daughter, and, in the absence of any one to represent and advise her, persuaded her to sign unwillingly

<sup>1</sup> *Mackall v. Mackall*, 135 U. S. 167, 47 N. J. Eq. 122, 20 Atl. Rep. 41; *Spar-gur v. Hall*, 62 Iowa, 498, 500, 17 N. W. Rep. 743; *Paddock v. Pulsifer*, 43 Kans. W. Rep. 371.

<sup>2</sup> *Beith v. Beith*, 76 Iowa, 601, 41 N. W. Rep. 718, 23 Pac. Rep. 1049.

<sup>3</sup> *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. Rep. 622; *Martling v. Martling*, 10 N. E. Rep. 622; *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. Rep. 705, per Brewer, J.

a deed which he had taken with him, already prepared. The father was at the time old and feeble, and died a few days afterwards. It was held that the deed should be set aside.<sup>1</sup>

111. A voluntary conveyance made by a father to a son, in consideration that the latter will support his father and mother during life, will not be set aside upon the application of the parents or of the other children, in the absence of proof that undue influence was used to obtain the conveyance.<sup>2</sup> If the circumstances surrounding the transaction tend strongly to show that the execution of the deed was the offspring of the grantor's own mind, and was in accordance with an intention and desire long expressed, and the testimony in regard to his capacity is conflicting, the validity of the deed will be sustained, especially if there has been an acquiescence of all parties in interest in the act of the grantor for a considerable period.<sup>3</sup>

#### IV. *Relation of Husband and Wife.*

112. The relation of husband and wife, though confidential, does not of itself warrant a presumption of undue influence. Such a presumption arises only when there is something suspicious in the circumstances, or the nature or magnitude of the gift is such that it ought not to have been made and accepted.<sup>4</sup> A gift by the wife to the husband has been, however, regarded by the courts with much jealousy, and will not be sustained if evidence of undue influence is shown and the gift was improvident.<sup>5</sup> In an action by

<sup>1</sup> Davis v. Strange, 86 Va. 793, 11 S. E. Rep. 406.

<sup>2</sup> Collins v. Collins, 45 N. J. Eq. 813, 18 Atl. Rep. 860; Bush v. Johnson (Ky.), 12 S. W. Rep. 758; Argo v. Coffin, 142 Ill. 368, 32 N. E. Rep. 679; Marshall v. Marshall, 75 Ill. 132.

<sup>3</sup> Adair v. Cook (Ky.), 5 S. W. Rep. 412. And see Bowen v. Hughes, 5 Wash. St. 442, 32 Pac. Rep. 98; Lynch v. Doran, 95 Mich. 395, 54 N. W. Rep. 882; Falls v. Falls, 78 Iowa, 756, 42 N. W. Rep. 511.

<sup>4</sup> Hadden v. Larned, 87 Ga. 634, 13 S. W. Rep. 806; Shipman v. Furniss, 69 Ala. 555, 564, 44 Am. Rep. 528; Small v. Small, 4 Me. 220; Gunther v. Gunther, 69 Md. 560; Golding v. Golding, 82 Ky.

51; Finlayson v. Finlayson, 17 Oreg. 347, 21 Pac. Rep. 57; Kennedy v. Ten Broeck, 11 Bush, 241; Scarborough v. Watkins, 9 B. Mon. 540, 1 Am. Dec. 528; Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. Rep. 497; Latham v. Udell, 38 Mich. 238.

<sup>5</sup> Boyd v. De La Montagnie, 73 N. Y. 498, 502; Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; McRae v. Battle, 69 N. C. 98; Stiles v. Stiles, 14 Mich. 72; Converse v. Converse, 9 Rich. Eq. 535; Sharpe v. McPike, 62 Mo. 300. Some of these authorities go to the extent of holding that, in a gift by a wife to her husband, the slightest evidence of influence on the part of the husband will invalidate it; and some of them assert a presumption of invalidity because of the confidential rela-

a wife to set aside a deed of land not her separate property, made by her at the request of her husband, evidence that her husband was a man of imperious will and positive convictions, and that his personal influence over his wife was such that his request was equivalent to a command, is no evidence of undue influence.<sup>1</sup> In an action by a wife to set aside a conveyance by her to her husband of her lands made without consideration, it appeared that, while she was sick and in an enfeebled condition, she was subjected to continued persuasion and urgency by her husband, from which she finally sought relief by executing the conveyance, without time for reflection, or opportunity to take advice from any disinterested person, and the conveyance was set aside.<sup>2</sup>

113. Undue influence will not be inferred from the mere fact of the execution of a voluntary deed in favor of a wife, son, daughter, or other near relative not standing in a position of authority or special influence in regard to the grantor. The fact that an old man conveyed his farm to his second wife, when he had several years previously made a will in which he had given her only a life interest in it, affords no evidence of undue influence.<sup>3</sup> The mere relation of parent and child is not sufficient to

tion. These cases are criticised in Hadden v. Larned, 87 Ga. 634, 13 S. E. Rep. 806, where it was held that such a gift is *prima facie* valid, and Bleckley, C. J., said: "That, in the present state of the law, a wife is legally competent to make a gift to her husband, is not questionable. When she exercises this power by a solemn deed of conveyance, would it not conflict with all the analogies of the law to treat the deed as *prima facie* void, and require it to be upheld by extrinsic evidence before any fact whatever tending to impeach it has been adduced?"

<sup>1</sup> Allen v. Drake, 109 Mo. 626, 19 S. W. Rep. 41. In this case the evidence showed that the husband had settled an ample separate estate on his wife, and, as her trustee, managed and kept a separate account of it; that he purchased certain land, and directed the deed to be made to his wife; that he paid for the property himself, and personally assumed an incumbrance thereon; that the deed was delivered to him, but never delivered by

him to his wife; that he requested his wife to deed the property to a third person, in order that such person might transfer the legal title to him; that the wife executed a deed as requested, and declared, on "an examination separate and apart from her husband, that she executed the same freely and without fear, compulsion, or undue influence;" and that the husband did not have the deed to his wife recorded till after her deed was filed for record. It was held that there was no evidence of undue influence on the part of the husband. See, however, Fowler v. Butterly, 78 N. Y. 68, 34 Am. Rep. 507.

<sup>2</sup> Aldridge v. Aldridge, 120 N. Y. 614, 24 N. E. Rep. 1022.

<sup>3</sup> Shepardson v. Potter, 53 Mich. 106, 18 N. W. Rep. 575; Hodges v. Cook, 93 Mich. 577, 53 N. W. Rep. 823. And see Ellis v. Ellis, 5 Tex. Civ. App. 46, 23 S. W. Rep. 996; Brockway v. Harrington, 82 Iowa, 23, 47 N. W. Rep. 1013; Samson v. Samson, 67 Iowa, 253, 25 N. W. Rep. 233.

create a presumption of undue influence, so as to avoid a transfer of property, or to shift the burden of proof that the transaction was fair and equitable upon the person benefited; but if such relation be established, and the circumstances proved show that the beneficiary has reaped an undue advantage, or if it appears that the capacity of the grantor is such that the parties did not deal on terms of equality, then the burden is shifted, and the transaction is presumed fraudulent, unless it be affirmatively established that the grantee practised no deception and used no undue influence.<sup>1</sup> The influence of affection and kind offices, unconnected with fraud or contrivance, though it induces gratitude and recompense, is not undue.<sup>2</sup>

#### V. *Presumption and Proof of Undue Influence.*

114. There is a well-recognized distinction, as to the presumption of undue influence, between a gift by deed and a gift by will. In the case of a gift by deed, the presumed undue influence proceeds upon the natural assumption that a person while living has need of his property and a desire to retain it, unless he is to receive an adequate equivalent for it. With respect to a testamentary gift this ground of presumption is lacking. Moreover, in the case of a gift by deed the transaction is one *inter vivos*, and the donee knows all the circumstances of the transaction; but in the case of a gift by will the beneficiary is not a party to the transaction, and does not necessarily know anything of the circumstances which induced the gift, and it would be manifestly unfair to cast upon him the burden of showing that the gift came about without any undue influence. "The very considerations which lead to suspicion, which must be removed in transactions *inter vivos*, — friendship, trust and confidence, affection, personal obligations, — may, and generally do, justly and properly, give direction to testamentary dispositions."<sup>3</sup> Stronger

<sup>1</sup> *Green v. Roworth*, 113 N. Y. 462, 21 N. E. Rep. 165; *In re Smith's Will*, 95 N. Y. 516; *Toms v. Greenwood*, 30 N. Y. St. Rep. 478, 9 N. Y. Supp. 666; *Nailor v. Nailor*, 5 Mackey, 93. *v. Starr*, 47 N. J. Eq. 244, 20 Atl. Rep. 875; *Carty v. Connolly*, 91 Cal. 15, 27 Pac. Rep. 599; *Eakle v. Reynolds*, 54 Md. 305; *Hamilton v. Armstrong*, 120 Mo. 597, 25 S. W. Rep. 545, 20 S. W. Rep. 1054.

<sup>2</sup> *Le Gendre v. Goodridge*, 46 N. J. Eq. 419, 19 Atl. Rep. 543; *Clifton v. Clifton*, 47 N. J. Eq. 227, 21 Atl. Rep. 333; *White v. Bancroft*, 69 Ala. 555, 564. *Bancroft v. Otis*, 91 Ala. 279, 8 So. Rep. 286, per McClellan, J. And see *Shipman v. Furniss*, 69 Ala. 555, 564.



proof is therefore required to raise a presumption of undue influence in the case of a will than in the case of a deed.<sup>1</sup>

115. The fact that one under disability of any kind has acted without the advice of counsel or friends has a strong bearing upon the question of the validity of the transaction.<sup>2</sup> Thus, where an aged and illiterate woman had made a deed of gift to her priest, who had proposed to her that he would bring about a separation from her husband, which she desired, if she would convey her real estate to him subject to her use for life, and she acted without the advice of counsel, it was held that the burden of proving that she knew the legal effect of her act rested upon the donee. The court in giving judgment said: "The first suggestion of making this conveyance occurred in a private conversation between herself and her donee, no one else being present. Her instructions to draw the necessary instruments were conveyed to his own lawyer by the donee, she having no personal interview with such scrivener, and the papers were finally executed in the presence and under the supervision of the counsel of the donee; so that from first to last, with respect to this all-important transaction, she had no adviser of any kind, either legal or lay. Indeed, there is no reason to believe that, from the commencement of the business to its close, she had spoken to any one about it but the appellant himself. The crucial question therefore occurs, did

<sup>1</sup> *Shipman v. Furniss*, 69 Ala. 555, 564.

<sup>2</sup> *Taylor v. Taylor*, 8 How. 183; *Konrad v. Zimmermann*, 79 Wis. 306, 48 N. W. Rep. 368; *Ross v. Conway*, 92 Cal. 632, 28 Pac. Rep. 785; *Burke v. Taylor*, 94 Ala. 530, 10 So. Rep. 129; *Moore v. Moore*, 81 Cal. 195, 22 Pac. Rep. 589; *Klose v. Hillenbrand*, 88 Cal. 473, 26 Pac. Rep. 352; *Martling v. Martling*, 47 N. J. Eq. 122; *Shaw v. Shaw*, 9 N. Y. Supp. 897; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. Rep. 275. The rule is strongly stated in *Rhodes v. Bate*, L. R. 1 Ch. App. 252, 257, by Lord Justice Turner, who says: "I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred

upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled and general principle of the court; and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are of but little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence."

this woman, thus old and ignorant, know the legal effect of the act she then did?"<sup>1</sup>

But the mere fact that one has made a conveyance for an inadequate consideration, or even without any, to another standing in a confidential relation to the grantor, without taking independent advice, does not of itself show that the conveyance was induced by undue influence or oppression. Such circumstance, however, throws the burden of proving that the conveyance was voluntarily made, with full knowledge of its effect, and without undue influence or undue advantage arising out of the confidential relation, upon the grantee who claims the benefit of the conveyance.<sup>2</sup>

Where a woman, owning land subject to mortgages made by others, who was unacquainted with business, weak, nervous, and troubled, under the advice of one who was either ignorant or false to her interests, made a deed to the mortgagees conveying the land in payment of the mortgages, which did not amount to half the value of the land, the deed was set aside. The mortgagees were men of affairs and were aided by legal counsel, and the mortgagor was made to believe that the property could not be sold with the mortgages on it. The parties did not deal on equal terms. The woman was misled as to her legal rights, and over-persuaded to convey her property.<sup>3</sup>

**116. Influence obtained by the use of unlawful or immoral means is undue influence, and no one should be permitted to derive benefit therefrom.<sup>4</sup> The exercise of such influence will be**

<sup>1</sup> *Corrigan v. Pironi*, 48 N. J. Eq. 607, 23 Atl. Rep. 355; *Pironi v. Corrigan*, 47 N. J. Eq. 135, 157, 20 Atl. Rep. 218. Pitney, V.-C., in the court of chancery, said: "It seems to me that the complainant, laboring as she did under the combined disadvantages of great age and of dense ignorance and inexperience, and dealing with a person in whom she had the utmost confidence, had especial need of, and was especially entitled to, and should have had the benefit of, a full, free, and private preliminary conference with a competent lawyer or business man who was employed and paid by her, and in whom she had confidence, and who would be devoted to her interests, and hers only."

<sup>2</sup> *Carty v. Connolly*, 91 Cal. 15, 27 Pac. Rep. 599.

<sup>3</sup> *Toland v. Corey*, 6 Utah, 392, 24 Pac. Rep. 190.

<sup>4</sup> *Leighton v. Orr*, 44 Iowa, 679; *Hanna v. Wilcox*, 53 Iowa, 547, N. W. Rep. 717; *Dean v. Negley*, 41 Pa. St. 312, 80 Am. Dec. 620; *Kessinger v. Kessinger*, 37 Ind. 341; *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528; *Bivins v. Jarnigan*, 3 Bax. 282; *Valentine v. Lunt*, 51 Hun, 544, 3 N. Y. Supp. 906.

In *Shipman v. Furniss*, 69 Ala. 555, 565, Somerville, J., deduces the following principle as being sound in law and in morals, and sustained by the more modern authorities: "When one, living in illicit sex-

presumed where the grantor and grantee live in unlawful cohabitation. In such case, in the absence of proof of a valid consideration for the conveyance, the burden is upon the party asserting its validity to show that it was not procured by undue influence.<sup>1</sup> As declared by Lord Eldon: <sup>2</sup> "Whenever a person obtains by voluntary donation a large pecuniary benefit from another, the burden of proving that the transaction is righteous falls on the person taking the benefit." The improvidence of the donation is always a circumstance strongly tending to show fraud or undue influence, especially where the donor, in making the gift, excludes natural and legitimate objects of his bounty.<sup>3</sup>

A deed by a father to an illegitimate child, or to such child's mother, with whom he lives in illegal intercourse though he has a wife and legitimate children, is good if there was no fraud or undue influence, and will be sustained as against the legitimate children. Although a deed made between parties living in illegal sexual relations is open to suspicion of fraud or undue influence, it will be sustained in the absence of evidence that it was procured by either means.<sup>4</sup>

VI. *Deed procured by undue Influence is voidable only.*

117. A deed procured by undue influence is voidable and not absolutely void.<sup>5</sup> If the grantor desires to avoid the deed, he must act with promptness before the land has increased in value, or valuable improvements have been made by the purchaser.<sup>6</sup>

There may be a ratification of such a deed by the acts and conduct of the grantor in relation to the transaction; as where

ual relations with another, makes a large gift of his property to the latter, especially in cases where the donor excludes natural objects of his bounty, the transaction will be viewed with such suspicion by a court of equity as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence."

<sup>1</sup> *Coulson v. Allison*, 2 De G. F. & J. 521; *Leighton v. Orr*, 44 Iowa, 679; *Hanna v. Wilcox*, 53 Iowa, 547, 5 N. W. Rep. 717; *Staley v. Housel*, 35 Neb. 160, 52 N. W. Rep. 888.

<sup>2</sup> *Gibson v. Jeyes*, 6 Ves. 266.

<sup>3</sup> *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528; *Staley v. Housel*, 35 Neb. 160, 52 N. W. Rep. 888.

<sup>4</sup> *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. Rep. 1001.

<sup>5</sup> *Shipman v. Furniss*, 69 Ala. 555; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. Rep. 622.

<sup>6</sup> *Dent v. Long*, 90 Ala. 172, 7 So. Rep. 640; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. Rep. 643.

DEED PROCURED BY UNDUE INFLUENCE IS VOIDABLE ONLY. [§ 118.

one who had made a conveyance to his wife, through undue influence, after her death treated the land as belonging to her children, and asked an attorney if the deed was sufficient to give them title, stating that, if it was not, he wanted to make it so.<sup>1</sup>

If the grantor received other land in exchange for that conveyed through undue influence, the transaction is ratified by a sale of a part of the land taken in exchange.<sup>2</sup>

A deed obtained by undue influence, or alleged to have been so obtained, is validated by the grantor's will referring to and confirming the deed after the alleged influence had been wholly removed.<sup>3</sup>

118. A conveyance obtained by the undue influence of a third person will not be set aside as against a purchaser for full value who had no knowledge or notice that the conveyance was so obtained.<sup>4</sup> Thus, a conveyance by a married woman, executed through the undue influence of her husband, to a grantee who was not in any way informed of the means by which the deed was procured, cannot be impeached by her because of such undue influence.<sup>5</sup>

<sup>1</sup> *Ellis v. Ellis*, 5 Tex. Civ. App. 46, 23 S. W. Rep. 996.

<sup>4</sup> *Dent v. Long*, 90 Ala. 172, 7 So. Rep. 640; *Moog v. Strang*, 69 Ala. 98.

<sup>2</sup> *Dent v. Long*, 90 Ala. 172, 7 So. Rep. 640.

<sup>5</sup> *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Moses v. Dade*, 58 Ala. 211.

<sup>3</sup> *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. Rep. 622.

## CHAPTER VII.

### DISABILITY FROM ADVERSE POSSESSION.

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|---|---|
| I. At common law and by statute, 119-121. | II. What constitutes adverse possession, 122-130. |
|   | III. Application of the rule, 131-140.            |

#### *I. At Common Law and by Statute.*

119. At common law the conveyance of land in the adverse possession of another was void. When livery of seisin was essential to a conveyance of land, it was of course impossible to make livery when the land was in the possession of another.<sup>1</sup> In this country livery of seisin, though used as a mode of conveying land in the colonies at a very early period, was never generally adopted, and quite soon gave place to the mode which now prevails, — by deed duly delivered without entry upon the land. There is, therefore, no good reason, founded on livery of seisin, why a person who has any right or interest in lands should not convey this by deed, notwithstanding that another holds adverse possession.

But another reason for the common-law rule is found in the policy of the law to prevent the sale of pretended titles whereby litigation is encouraged. If a grantor was out of possession, and another claimed adverse possession, his deed transferred to his grantee only a right of action. This was prohibited by the statute of Henry VIII.,<sup>2</sup> which is said to have been enacted in

<sup>1</sup> *Dexter v. Nelson*, 6 Ala. 68; *Caasedy v. Jackson*, 45 Miss. 397, 402; *McMahan v. Bowe*, 114 Mass. 14, 144, 19 Am. Rep. 321.

<sup>2</sup> 32 Henry VIII. ch. 9. This statute is in affirmance of the older common law. The statute was held to apply as against the true owner out of possession. "If he who is out of possession bargains or sells, or makes any covenant or promise to part with the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he, who so bargains, sells, or promises, have a good and true right and title or not; and on this point the statute has not altered the law, for the common law before this statute was, that he who was out of possession might not bargain, grant, or let his right or title, and if he had done so it should have been void." 1 Plowd. 88, per Montague, C. J. By statute 8 & 9 Vict. ch. 106, § 6, a right of entry may be dis-

consequence of the prevalence of the buying of pretended titles after the introduction of uses.<sup>1</sup> "Its creation is probably attributable more, however, to the exigency attending the time of enactment, and consequent upon sudden revolution, accompanied with a change of title of perhaps a considerable portion of the property of the kingdom. Those thus acquiring power and property would naturally desire to place every possible barrier in the way of a claim by the former owner, or by one claiming through him. In our country, however, no such reason has existed. Nor under a government like ours, where caste does not exist, and titled name does not in itself confer power, is it necessary to enact a law for the benefit of the weak as against the strong. The reason for its enactment with us is to prevent litigation, and the purchase of doubtful claims by strangers to them. If the owner is not disposed to attempt the enforcement of a doubtful claim, public policy requires that he should not be allowed to transfer it to another party, and thus encourage strife and litigation. It has, therefore, been deemed beneficial to the public interest to prohibit it; and time has manifested that it works no injury to the honest man, while it may, and in fact does, often interfere with the interests of keen-sighted speculators, and prevent a practice of purchasing doubtful titles."<sup>2</sup>

The public policy of this doctrine is declared by Chancellor

posed of by deed. "This would appear to amount to a statutory sanction to the transfer of the right to bring an action for the recovery of every kind of real property in respect of which such a right of entry may exist. Such a construction of the statute would seem to be inconsistent with the continued assertion of illegality in regard to the transfer of what have been held to be pretended rights under the statute of Henry VIII., and would go far to render the latter statute inoperative." Tapp on Maintenance, p. 49. And see *Hunt v. Bishop*, 8 Exch. 675; *Hunt v. Remnant*, 9 Exch. 635.

Coke, commenting on the text of Littleton that no entry can be reserved to a stranger upon a feoffment, says: "Here Littleton reciteth one of the maxims of the common law; and the reason hereof is, for avoiding of maintenance, suppres-

sion of right, and stirring up of suits: and therefore nothing in action, entry, or reentry can be granted over; for so, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth as men to grant before they be in possession." 2 Co. Litt. 214 a.

According to Blackstone, the rule was partly at least founded on consideration of public policy, "lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed." 2 Bl. Com. 290. And see *Loud v. Darling*, 7 Allen, 205, 206.

<sup>1</sup> *Shortall v. Hinckley*, 31 Ill. 219, 229, per Walker, J.; *Hall v. Ashby*, 9 Ohio, 96.

<sup>2</sup> *Russell v. Doyle*, 84 Ky. 386, 389, 1 S. W. Rep. 604, per Holt, J.

Kent, who says: "It seems to be the general sense and usage of mankind that the transfer of real property should not be valid unless the grantor hath the capacity as well as the intention to deliver possession."<sup>1</sup>

**120. Statutes removing the disability of adverse possession.**—Accordingly it is provided by statute in several of the States that a person claiming title to real property in the adverse possession of another may transfer it with the same effect as if he were in actual possession.<sup>2</sup> The effect of the statutes removing the disability of an owner of land out of possession is simply

<sup>1</sup> 4 Kent Com. 448. The reason of public policy is also declared in *Vandiveer v. Stickney*, 75 Ala. 225; *Bernstein v. Humes*, 60 Ala. 582; *Clay v. Wyatt*, 6 J. J. Marsh. 583.

<sup>2</sup> *Arkansas*: Digest of Stats. 1884, § 644. *California*: Civ. Code, §§ 1047, 2921. *Colorado*: G. S. 1883, § 202. *Georgia*: Code 1882, § 2695. The common-law doctrine formerly prevailed. *Gresham v. Webb*, 29 Ga. 320; *King v. Sears*, 91 Ga. 577, 18 S. E. Rep. 830. *Idaho*: R. S. 1887, § 2902. *Illinois*: R. S. 1889, ch. 30, § 4; *Fetrow v. Merriwether*, 53 Ill. 275; *Torrence v. Shedd*, 112 Ill. 466. *Iowa*: 1 Annot. Code & Stats. 1888, § 3103. *Kansas*: 1 G. S. 1889, ¶ 1115, p. 354. *Maine*: R. S. 1883, ch. 73, § 1; *Hovey v. Hobson*, 51 Me. 62; *Pratt v. Pierce*, 36 Me. 448, 58 Am. Dec. 758. *Michigan*: 2 Annot. Stats. 1882, § 5657; *Crane v. Reeder*, 21 Mich. 24; *Roberts v. Cooper*, 20 How. 467. *Minnesota*: G. S. 1894, § 4165. *Mississippi*: Annot. Code 1892, § 2433; *Cassey v. Jackson*, 45 Miss. 397; *Sessions v. Reynolds*, 7 Sm. & M. 130; *Bledsoe v. Doe*, 4 How. 13. *Missouri*: R. S. 1889, § 2400. *Montana*: Comp. Stats. 1887, p. 663, § 268. *Nevada*: G. S. 1885, § 2603. *Oregon*: G. L. 1892, § 3009. *Wisconsin*: Annot. Stats. § 2205. *Wyoming*: R. S. 1887, § 7.

In the following named States the statute of 32 Henry VIII. was never adopted, nor was any statute in place of it ever enacted. *Georgia*: *Webb v. Camp*, 26 Ga. 354; *Cain v. Monroe*, 23 Ga. 82; *Harring v. Barwick*, 24 Ga. 59. *Maryland*: The

statute is regarded as in a great measure obsolete in this State. The courts say that they are not aware of any case in that State where the provisions of the statute have been enforced. *Schaferman v. O'Brien*, 38 Md. 565. *New Hampshire*: The doctrine does not prevail: *Whittemore v. Bean*, 6 N. H. 47, 50; *Hadduck v. Wilmarth*, 5 N. H. 181.

In Ohio, there being no statute against maintenance, it is held that a valid conveyance may be made of land in the adverse possession of another. *Hall v. Ashby*, 9 Ohio, 96, 34 Am. Dec. 424; *Cressinger v. Welch*, 15 Ohio, 190; *Borland v. Marshall*, 2 Ohio St. 308, 314; *Key v. Vattier*, 1 Ohio, 132.

In Pennsylvania a conveyance by a person of lands of which he is not in possession, but which are held adversely, is legal. *Murray's Estate*, 13 Pa. Co. Ct. 70; *Humes v. McFarlane*, 4 S. & R. 435; *Storer v. Whitman*, 6 Biss. 420; *Cresson v. Miller*, 2 Watts, 272.

In South Carolina, though the statute 32 Henry VIII. ch. 9, prohibiting the sale of pretended titles, was included in the table of English statutes in force in this State, it has always been held that one having title but not possession may make a valid conveyance, and that the common law on this subject was never in force in this State. *Poyas v. Wilkins*, 12 Rich. 420, 428.

*Texas*: The statute of 32 Henry VIII. was never adopted in this State. *Bentick v. Franklin*, 38 Tex. 458, 473.

to enable him to invest the grantee with all the rights of the owner precisely as he held them.<sup>1</sup>

121. The common-law doctrine has been affirmed by statute and by judicial decisions in a minority of the States.<sup>2</sup> The strict doctrine which anciently prevailed has been greatly modified. Even in those States in which the doctrine is retained, inasmuch as the reasons for it have in a great measure ceased to exist, the tendency of the later decisions is to modify it so as to make it reasonable and just.<sup>3</sup> Thus, the deed of a grantor out of possession is not absolutely void, but void only as against the adverse claimant in possession. It is good as between the parties, and persons standing in legal privity with them.<sup>4</sup> The grantee is, moreover, entitled, even as against the person in adverse possession, to an action in the name of the grantor to recover the land; and if he is able to get possession peaceably without an action, he may hold the land by virtue of his deed.<sup>5</sup>

<sup>1</sup> Shortall v. Hinckley, 31 Ill. 219.

<sup>2</sup> In several States, by statute, a conveyance of land in the possession of a person claiming adverse title is absolutely void as against such person. Connecticut: G. S. 1888, § 2966; Harral v. Levery, 50 Conn. 46, 87 Am. Rep. 608. Kentucky: Stats. 1894, § 210; Combs v. McQuinn (Ky.), 9 S. W. Rep. 495; Luen v. Wilson, 85 Ky. 503, 3 S. W. Rep. 911; Cardwell v. Sprigg, 7 Dana, 36. New York: 4 R. S. 1889, p. 2453; Becker v. Church, 115 N. Y. 562, 22 N. E. Rep. 748. North Dakota: Comp. Stats. 1887, § 3303. Oklahoma: G. S. 1893, § 6137. South Dakota: Comp. Stats. 1887, § 3303. Tennessee: A grant is void if the grantor has not been in actual possession for one whole year next before the sale. Champerty is presumed until the purchaser shows the sale was *bona fide*, if the land is adversely held under color of title. Code 1884, §§ 2445-2449; Pickens v. Delozier, 2 Humph. 400; Hardwick v. Beard, 10 Heisk. 659. Vermont: R. L. 1880, § 1953. "The statute was enacted to carry out a principle of the common law which forbids the traffic and speculation in matters of dispute and litigation and this cut up by the roots the business of breeding lawsuits." Stacy v. Bostwick, 48 Vt. 192, per Redfield, J.

The common-law rule, or the statute of

Henry VIII. as modified by the decisions of the courts, prevails in a few States. Alabama: Bernstein v. Humes, 75 Ala. 241, 60 Ala. 582; Johnson v. Cook, 73 Ala. 537. Florida: Nelson v. Brush, 22 Fla. 374; Doe v. Roe, 13 Fla. 602; Gamble v. Hamilton, 31 Fla. 401; Levy v. Cox, 22 Fla. 546. Indiana: Webb v. Thompson, 23 Ind. 428, 432, although there is no statute against champerty and maintenance; German Mut. Ins. Co. v. Grim, 32 Ind. 249, 257; Patterson v. Nixon, 79 Ind. 251. Massachusetts: Sobier v. Coffin, 101 Mass. 179; Brinley v. Whiting, 5 Pick. 348; Swett v. Poor, 11 Mass. 553; Wolcott v. Knight, 6 Mass. 424; Lound v. Darling, 7 Allen, 205. Rule now changed, Acts 1891, ch. 354. North Carolina: Justice v. Eddings, 75 N. C. 581; Hoppies v. Eskridge, 2 Ired. Eq. 54. Rhode Island: Burdick v. Burdick, 14 R. I. 574; Hall v. Westcott, 15 R. I. 373, 5 Atl. Rep. 629. Virginia: Hopkins v. Ward, 6 Mun. 38; Allen v. Smith, 1 Leigh, 231.

<sup>3</sup> McMahan v. Bowe, 114 Mass. 140; Sparhawk v. Bagg, 16 Gray, 583; Webb v. Thompson, 23 Ind. 428.

<sup>4</sup> Steeple v. Downing, 60 Ind. 478; Patterson v. Nixon, 79 Ind. 251.

<sup>5</sup> Sparhawk v. Bagg, 16 Gray, 583, per Chapman, J.



## II. *What constitutes Adverse Possession.*

122. It is not necessary that the title of the disseisor be valid to constitute an adverse possession under the rule. His title may be bad, or his original entry may have been by permission of the true owner.<sup>1</sup> It is only necessary that he should have color of title, and that this color of title should purport to give him a freehold estate adverse to that of the grantor.<sup>2</sup> He must have title, or color of title, as distinguished from a mere claim of title.<sup>3</sup> Therefore, if the adverse claimant be the mortgagor, or some one holding under him after the mortgage has been foreclosed, his title is extinguished, and he has neither title nor color of title.<sup>4</sup> If the person in possession of a mine has no title, but only an executory contract for the purchase of the products of the mine, he is not in possession of it under an adverse title which would invalidate the owner's deed. Such person is at best only a licensee, and his license is revoked by the owner's deed.<sup>5</sup>

123. But a deed obtained by fraud or forgery will not serve as the foundation of an adverse possession. It is essential that the adverse claimant, in making his entry upon the land, should have acted in good faith in the belief that he had title.<sup>6</sup> He must rely upon his title and have some ground for reliance. A deed is not available for such purpose in case it was executed by an attorney of the grantor without authority, and the want of authority was known to the grantee.<sup>7</sup>

124. To render a deed void on account of adverse possession, the adverse claimant must have actual exclusive possession under claim of a specific title, and not under a general

<sup>1</sup> *Barry v. Adams*, 3 Allen, 493; *Hall v. Stevens*, 9 Met. 418; *Pearce v. Moore*, 114 N. Y. 256, 21 N. E. Rep. 419; *Thurman v. Cameron*, 24 Wend. 87.

<sup>2</sup> *Smith v. Faulkner*, 48 Hun, 186; *Crooked Lake Nav. Co. v. The Keuka Nav. Co.* 37 Hun. 12. In *Selleck v. Starr*, 6 Vt. 194, it was held that a claim of an estate for the life of the grantor is not sufficient to make the grantor's deed made during such possession void.

<sup>3</sup> *Granger v. Swart*, 1 Woolw. 88; *Church v. Schoonmaker*, 42 Hun. 225; *Dawley v. Brown*, 79 N. Y. 390; *Fish v. Fish*, 39 Barb. 513; *Smith v. Faulkner*, 48 Hun,

186; *Crary v. Goodman*, 22 N. Y. 170; *Bowie v. Brahe*, 3 Duer, 35; *Crooked Lake Nav. Co. v. Keuka Nav. Co.* 37 Hun, 12; *Monnots v. Husson*, 39 How. Pr. 447.

<sup>4</sup> *Barley v. Roosa*, 20 N. Y. Civ. Proc. 113, 13 N. Y. Supp. 209.

<sup>5</sup> *Moore v. Brown*, 62 Hun, 618, 16 N. Y. Supp. 592.

<sup>6</sup> *Livingston v. Peru Iron Co.* 9 Wend. 511; *Smithwick v. Jordan*, 15 Mass. 113; *Moore v. Worley*, 24 Ind. 81.

<sup>7</sup> *Livingston v. Peru Iron Co.* 9 Wend. 311.

assertion of ownership.<sup>1</sup> What the title is must be disclosed, that the court may see that it is adverse to that of the grantor in the deed assailed.<sup>2</sup> Accordingly, where one occupied a hundred and thirty acres of land, having title to only one hundred acres, but supposed the entire tract so occupied to contain only one hundred acres, his possession of the thirty acres was held not to be adverse so as to render a grant by the true owner void. A mere mistake in location or in quantity without a specific title or claim of such title does not create an adverse possession.<sup>3</sup>

Possession under a tax deed is possession under a title, or color of title.<sup>4</sup>

The cases are not, however, in harmony on this point; for it is held that, instead of an adverse possession under a title or color of title, it is sufficient that it is asserted under a claim of title. It need not be asserted under an honest belief that the claimant has a title or good claim to the land.<sup>5</sup> He may even know that his title is defective, as where he is in possession under a parol gift.<sup>6</sup>

125. To render a deed void on account of adverse possession at the time of its delivery, the land must be in the actual possession of one claiming adversely.<sup>7</sup> A constructive possession is not enough. But a deed is not void for the reason that, at the time of its delivery, a small part of the land described is not in the actual possession of the grantor, but is held adversely by reason of a disputed boundary line, the greater part of the land being in the grantor's actual possession.<sup>8</sup> In other cases construc-

<sup>1</sup> *Dawley v. Brown*, 79 N. Y. 390; *v. Davis*, 28 Abb. N. C. 135, 19 N. Y. Cray v. Goodman, 22 N. Y. 170; *Snyder v. Church*, 70 Hun, 428; *Sands v. Church*, 70 Hun, 483, 24 N. Y. Supp. 251. See *Matter of Department of Parks*, 73 N. Y. 560; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Christie v. Gage*, 71 N. Y. 189, 192.

<sup>2</sup> *Dawley v. Brown*, 79 N. Y. 390, per *Rapallo, J.*; *Crary v. Goodman*, 22 N. Y. 170.

<sup>3</sup> *Crary v. Goodman*, 22 N. Y. 170.

<sup>4</sup> *Gately v. Weldon* (Ky.), 14 S. W. Rep. 680; *Sweet v. Poor*, 11 Mass. 549.

<sup>5</sup> *Vandiveer v. Stickney*, 75 Ala. 225; *Bernstein v. Humes*, 71 Ala. 260; *Eureka Co. v. Edwards*, 71 Ala. 248.

<sup>6</sup> *Vandiveer v. Stickney*, 75 Ala. 225.

<sup>7</sup> *Dawley v. Brown*, 79 N. Y. 390; *Clark*

*Danziger v. Boyd*, 120 N. Y. 628;

*Allen v. Welch*, 18 Hun, 226; *Clark v. Davis*, 28 Abb. N. C. 135, 19 N. Y. Supp. 191; *Harris v. Oakley*, 2 N. Y. Supp. 305, 7 N. Y. Supp. 232; *Crary v. Goodman*, 22 N. Y. 170; *Smith v. Faulkner*, 48 Hun, 186. See, however, *Lillie v. Hickman* (Ky.), 25 S. W. Rep. 1062; *Smith v. Price* (Ky.), 7 S. W. Rep. 918; *Mitchell v. Churchman*, 4 Humph. 218.

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tive possession of a part or residue is sufficient when the part not actually possessed is for use with, or is subservient to, the part that is held in possession, and has some necessary connection therewith.<sup>1</sup>

Where a deed of land bounds it by the land of an adjoining owner, it conveys all the grantor's title up to the true boundary of such adjoining owner, and is not void as to land belonging to the grantor, but held adversely by such owner at the time of the conveyance, in consequence of an erroneous location of the division fence.<sup>2</sup> While for some purposes the possession of wild and uncultivated forest lands may be regarded as being in the owner of the legal title, without any actual visible occupation by him, such possession is constructive merely, and is no notice of an adverse claim to a purchaser, and no impediment to the delivery of actual possession to him, and is not therefore within the reason of the rule against selling pretended titles.<sup>3</sup>

The grantor's possession must be something more than a temporary occupancy of a portion of the land at the time of the execution of the conveyance, after an adverse possession of the whole by another has commenced.<sup>4</sup>

126. Whether possession is actually held adversely to the grantor at the time of the sale is a question of fact for the jury.<sup>5</sup> And so it is a question for the jury whether one who has been disseised, and has subsequently entered upon the land, has made such a reëntury as will enable him to convey his estate by deed.<sup>6</sup> An entry on land by a person disseised, merely for the purpose of seeing if there is any evidence of an adverse occupation, is not, as matter of law, conclusive evidence of an interruption of the disseisor's possession; but this is a question for the jury, to be determined upon all the evidence in the case.<sup>7</sup>

127. If a disseisor abandons his possession, and the grantee rightfully enters and occupies, he takes title under the deed; and so, if the grantee is in possession when the deed is made, the latter acquires an indefeasible title.<sup>8</sup> The owner of land held in adverse

<sup>1</sup> *Thompson v. Burhans*, 79 N. Y. 93.

<sup>7</sup> *Bowen v. Guild*, 130 Mass. 121.

<sup>2</sup> *Sparhawk v. Bagg*, 16 Gray, 583; *Cleveland v. Flagg*, 4 Cush. 76.

<sup>8</sup> *Snow v. Orleans*, 126 Mass. 453; *McMahan v. Bowe*, 114 Mass. 140; *Farnum v. Peterson*, 111 Mass. 148; *Oakes v. Marcy*, 10 Pick. 195; *Knox v. Jenks*, 7 Mass. 488.

<sup>3</sup> *Hanna v. Renfro*, 32 Miss. 125.

<sup>4</sup> *Vandiveer v. Stickney*, 75 Ala. 225.

<sup>5</sup> *Whitesides v. Martin*, 7 Yerg. 384.

<sup>6</sup> *Brickett v. Spofford*, 14 Gray, 514.

possession may make a valid conveyance of the land to the adverse holder,<sup>1</sup> or to another with the consent of the adverse holder.<sup>2</sup>

When a trust relation subsists between the grantor and the person in possession, a conveyance by either to the other which merges the legal and equitable estates is not within the prohibition of the common-law doctrine, or a statute founded upon it.<sup>3</sup>

128. An entry by the disseisee, and delivery of a deed upon the land, purges the disseisin, and makes the deed effectual to pass all the title originally acquired and held by the grantor at the time of his conveyance.<sup>4</sup> His peaceable entry restores the possession to the grantor for the time being, so that the technical difficulty of a want of capacity to convey, in one who is disseised, no longer exists. The mere fact that the owner's title is questioned does not prevent his conveying the land if he can deliver the deed upon the land.<sup>5</sup>

If the grantee of one who was disseised at the time of the conveyance enters upon the land he is a trespasser, and, having gained possession by his own tortious act, he cannot justify his entry in defence to an action of trespass; and it has been held that he cannot avail himself of his deed to render his continuance in possession lawful.<sup>6</sup> But the better rule is, that such grantee who has obtained possession can unite that possession to the title acquired by his deed, and so, by way of estoppel and to prevent circuitry of action, defeat a real action brought by the disseisor to recover the land.<sup>7</sup> The same result follows when the disseisor abandons his possession, because the abandonment inures to the benefit of the

<sup>1</sup> *Farnum v. Peterson*, 111 Mass. 148; *Betsey v. Torrance*, 34 Miss. 132; *Williams v. Council*, 4 Jones (N. C.), 206; *Webb v. Marsh*, 22 Can. S. C. 437; *Schwartz v. Kuhn*, 10 Me. 274, 25 Am. Dec. 239.

"It is a maxim in law that every right, title, or interest *in presenti* or *in futuro*, by the joint act of all them that may claim any such right, title, or interest, may be barred or extinguished, *i. e.*, every estate is grantable or transferable, and every right is releasable; and a conveyance by the person who has the estate, and the person who has the right, amounts to a

conveyance of the estate and a release of the right, and completes the title." 2 *Shep. Touch.* p. 240.

<sup>2</sup> *McIntire v. Patton*, 9 Humph. 447.

<sup>3</sup> *Stacy v. Bostwick*, 48 Vt. 192. And see *Falls v. Carpenter*, 1 Dev. & B. Eq. 237, 28 Am. Dec. 592.

<sup>4</sup> *Farwell v. Rogers*, 99 Mass. 33, 36; *Warner v. Bull*, 13 Met. 1.

<sup>5</sup> *Warner v. Bull*, 13 Met. 1; *Knox v. Jenks*, 7 Mass. 488; *Oakes v. Marcy*, 10 Pick. 195.

<sup>6</sup> *Hathorne v. Haines*, 1 Me. 238.

<sup>7</sup> *Rawson v. Putnam*, 128 Mass. 552.

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grantee, and gives him a seisin and a title valid against a stranger who subsequently disseises him.<sup>1</sup>

The owner may make a valid conveyance of land held in actual possession by another, provided such actual possession is not adverse to the owner.<sup>2</sup>

129. It is not requisite, under this doctrine, that the purchaser or mortgagee should have actual notice of the adverse holding in order to vitiate the grantor's conveyance,<sup>3</sup> though knowledge of such adverse possession would be material under a statute imposing a penalty for selling pretended titles.<sup>4</sup>

It has been held, however, that a disseisin which will defeat the operation of the owner's deed must be by occupancy of a part of the land under a deed of conveyance recorded, or such an open and visible occupancy that the owner may at once be presumed to know the extent of the disseisor's claim and occupation.<sup>5</sup>

130. It does not require any length of adverse possession to make a conveyance by a disseised owner void.<sup>6</sup> It does not matter that the adverse possession has continued no longer than four months at the time of the conveyance.<sup>7</sup> The fact that the land is held adversely at the time is sufficient to render the conveyance void, and it does not matter whether it has been so held for one day or one year.

III. *Application of the Rule.*

131. An adverse possession must be a possession inconsistent with the title of the grantor, and not subordinate thereto. If, on an agreement to sell land, the consideration is paid, and the owner consents that the buyer may enter and hold the land as his own, the entry and possession of the buyer cannot be deemed subordinate to the title of the seller, but as adverse and a disseisin. But the case is different where the consideration is not paid, and the party contracting to buy enters into possession, inasmuch as

<sup>1</sup> McMahan v. Bowe, 114 Mass. 140.

<sup>2</sup> Gamble v. Hamilton, 31 Fla. 401, 12 So. Rep. 229; Levy v. Cox, 22 Fla. 546; Whitesides v. Martin, 7 Yerg. 384; Bledsoe v. Rogers, 3 Sneed, 466.

<sup>3</sup> Vandiveer v. Stickney, 75 Ala. 225; Bernstein v. Humes, 71 Ala. 260; Jackson v. Demont, 9 Johns. 55.

<sup>4</sup> Jackson v. Demont, 9 Johns. 55; Jackson v. Andrews, 7 Wend. 152; Hassenfrats v. Kelly, 13 Johns. 466.

<sup>5</sup> Foxcroft v. Barnes, 29 Me. 128.

<sup>6</sup> Kincaid v. Meadows, 3 Head, 188.

<sup>7</sup> Sohler v. Coffin, 101 Mass. 179.

the fair inference then is, that the entry and possession are in subordination to the title of the party contracting to sell, until the stipulated payment is made.<sup>1</sup> And so, where the vendor of land retains the title as security for the purchase-money, his possession is presumptively subservient to the equitable ownership of the vendee, and hence does not render void a conveyance by the latter to a third person.<sup>2</sup>

A deed made to carry into effect a contract for the sale of land is not void, if there was no adverse possession at the time the contract was made, although the land was held adversely at the time of the delivery of the deed; and this rule has been applied even to an executory verbal contract of sale.<sup>3</sup>

132. A conveyance by a remainder-man or reversioner during the continuance of the life estate of a tenant for life is valid, although a grantee of the life tenant is in possession, claiming under a grant purporting to be a grant in fee. "The statute ought not to be construed so as to prevent a reversioner or remainder-man making a conveyance of his estate before he becomes entitled to the possession. But a conveyance after the termination of the particular estate, when the lands are held at the time under claim of an adverse title, is void within the letter and spirit of the statute."<sup>4</sup>

A *cestui que trust* cannot claim to hold adversely to his own trustee, and certainly a trustee cannot hold adversely to his *cestui que trust*.<sup>5</sup>

133. A mortgage is usually regarded as a conveyance within the meaning of the rule against conveying land held in adverse possession.<sup>6</sup> Although a mortgage is for most purposes only a lien, it is a conveyance of the legal title in terms, and the mortgagee is regarded as the legal owner as against the mortgagor

<sup>1</sup> *Brown v. King*, 5 Met. 173; *Hart v. Bostwick*, 14 Fla. 162, 177; *Drew v. Towle*, 30 N. H. 531; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433; *Jackson v. Spear*, 7 Wend. 401; *Briggs v. Prosser*, 14 Wend. 227; *Devyr v. Schaefer*, 55 N. Y. 446; In Matter of Department of Parks, 73 N. Y. 560; *Turner v. Thomas*, 13 Bush, 518; *Paxton v. Bailey*, 17 Ga. 600; *Wimbish v. Montgomery Mut. Asso.* 69 Ala. 575.

<sup>2</sup> *Ashurst v. Peck*, 14 So. Rep. 541.

<sup>3</sup> *Harral v. Levery*, 50 Conn. 46, 47 Am. Rep. 608; *Greer v. Wintersmith*, 85 Ky. 516, 4 S. W. Rep. 232; *Thacker v. Belcher* (Ky.), 11 S. W. Rep. 3; *Sims v. Cross*, 10 Yerg. 460; *McCoy v. Williford*, 2 Swan, 642.

<sup>4</sup> *Christie v. Gage*, 71 N. Y. 189, 193, per Andrews, J.

<sup>5</sup> *Clark v. McLean*, 41 Barb. 285.

<sup>6</sup> *Vandiveer v. Stickney*, 75 Ala. 225; *Redman v. Sanders*, 2 Dana. 68; *Gunn v. Scovil*, 4 Day, 234, 241. per Reeve, J.

for the purpose of protecting and enforcing his rights. The mortgagor is regarded as the legal owner as against every other person. In many States, however, even as against the mortgagor, the mortgage is regarded as giving the mortgagee merely a lien upon the land, with merely equitable rights and remedies. The fee simple of the land mortgaged is in the mortgagor; and the mortgagee, before entry or foreclosure, has at most a chose in action, and a right to the possession in order to render the mortgage available to the payment of his debt. Therefore it is held in Connecticut that a mortgage is not an alienation "for years, life, lives, or forever, or for any other term of time whatsoever," within the terms of the statute for the prevention of maintenance.<sup>1</sup> Though the terms of the statute have been changed, and it is now directed against "all conveyances, and leases for any term of lands or tenements," still a mortgage is not regarded as a "conveyance" within the meaning of the statute. It is apparent that these decisions are based upon the peculiar terms of the statute, and that they are not of general application.<sup>2</sup>

In case a deed is void for the reason that the land was held adversely to the grantor, a mortgage executed at the same time as a part of the transaction, to secure a part of the purchase-money, is also void.<sup>3</sup>

In New York it is provided that every person having a just title to lands of which there shall be an adverse possession may execute a mortgage on such lands; and such mortgage, if duly recorded, shall bind the lands from the time the possession thereof shall be recovered by the mortgagor or his representatives.<sup>4</sup>

<sup>1</sup> *Leonard v. Bosworth*, 4 Conn. 421. Hosmer, C. J., remarks that "mortgages are within the mischief at which the statute is aimed," but that they "are not within the literal construction of the act."

<sup>2</sup> *Harral v. Levery*, 50 Conn. 46, 47 Am. Rep. 608. Loomis, J., said: "Were the question entirely a new one, we should not regard it as free from difficulty. It is manifest that the statute can easily be evaded under the cover of a mortgage. . . . We regard the question, however, as settled by the former decisions of our own court."

<sup>3</sup> *Pepper v. Haight*, 20 Barb. 429.

<sup>4</sup> 4 R. S. 1889, p. 2453, § 148. It was

no part of the object of this statute to allow the mortgagee to maintain a suit as such mortgagee to recover possession. His mortgage does not bind the land until the mortgagor recovers possession. *Lowber v. Kelly*, 17 Abb. Pr. 452, 460. The revisers of the statutes, in a note to 3 R. S. 2d ed. (1836), p. 596, § 185, state that the purpose of this provision was to allow the person whose land is adversely held to avail himself of the property to defray the expenses of litigation necessary to recover possession. They therefore allowed him to mortgage his lands, though held adversely.

134. If the mortgagor is disseised by a stranger the mortgagee is also disseised, and, so long as the disseisin continues, neither the mortgagor nor the mortgagee can pass any title by deed.<sup>1</sup> In accordance with this rule, it is held that a mortgagee who is so disseised cannot make a valid assignment of his mortgage.<sup>2</sup> Other decisions have, however, held that an assignment of a mortgage, when a third person is in possession of the mortgaged property, is not within the rule. The mortgage is only an incident to the debt, which is the principal subject of the assignment. It would be manifestly foreign to the purpose of the statute to restrain the transfer of the mortgage debt.<sup>3</sup>

It is true in general, however, that, if the land is held adversely to both the grantor and the grantee, the rule applies. Thus, where a tenant by the curtesy and the heir are out of possession, and the land is held adversely to both, the tenant by the curtesy cannot convey or release to the heir; and it will make no difference that the heir is a child of the tenant by the curtesy.<sup>4</sup>

135. In the cases of mortgagor and mortgagee, landlord and tenant, heir at law and tenant in dower, the possession of the mortgagee, tenant, or tenant in dower is not adverse to the title in fee, but consistent therewith.<sup>5</sup> The possession of the mortgagee is no obstacle to a conveyance by the mortgagor of his equity of redemption.<sup>6</sup> It is familiar doctrine that the possession of the tenant is possession of the landlord.<sup>7</sup> The landlord may make a valid conveyance pending a suit in ejectment by him to oust the tenant.<sup>8</sup> The possession of a grantor or mortgagor is not adverse to that of his own alienee and those claiming under him.<sup>9</sup> The possession of the heir at law, or widow of a grantor or mortgagor, is not adverse to the grantee or mortgagee, or an assignee of the mortgagee. Both the heir and the widow are bound by the estoppel of the grantor or mortgagor, the former as privy in blood, the latter as privy in estate. They continue the

<sup>1</sup> *Poignand v. Smith*, 8 Pick. 272; *Hunt v. Hunt*, 14 Pick. 374, 385; *Dadmun v. Lamson*, 9 Allen, 85.

<sup>2</sup> *Dadmun v. Lamson*, 9 Allen, 85.

<sup>3</sup> *Williams v. Bennett*, 4 Ired. 122; *Converse v. Searls*, 10 Vt. 578.

<sup>4</sup> *Vrooman v. Shepherd*, 14 Barb. 441.

<sup>5</sup> *Chairs v. Hobson*, 10 Humph. 354; *Vance v. Johnson*, 10 Humph. 214, 221.

<sup>6</sup> *Converse v. Searls*, 10 Vt. 578, 581, per Royce, J.

<sup>7</sup> *Vandiveer v. Stickney*, 75 Ala. 225; *Whiting v. Edmunds*, 94 N. Y. 309.

<sup>8</sup> *Webb v. Bindon*, 21 Wend. 98; *Camp v. Forrest*, 13 Ala. 114.

<sup>9</sup> *Rowe v. Beckett*, 30 Ind. 154; *Williams v. Bennett*, 4 Ired. 122.



§§ 136-138.]     DISABILITY FROM ADVERSE POSSESSION.

estate and possession of the husband, and cannot set up an estate in themselves, or in any other person, as against the husband's grantee or mortgagee.<sup>1</sup>

136. The possession of a tenant in common of lands, who has ousted his co-tenant and holds adversely to him, does not impair a conveyance by the latter. The possession of one tenant in common is constructively the possession of all. A purchaser from one tenant in common may assume that the possession of a co-tenant is the possession of all, and for the benefit of all, whatever the real facts may be as to the possession.<sup>2</sup>

The rule does not apply in case of a conveyance by one tenant in common to his co-tenant of his undivided interest in the land which is held adversely. In such a case no stranger to the title is introduced, but merely one who is already interested, who may sue for the recovery of the property with an increased interest.<sup>3</sup> But the case is quite different where all the tenants in common of a parcel of land except one sold the whole land, including the interest of such one, who did not join, to a stranger to the title, and the latter entered upon the land in his own right, and was holding the actual adverse possession of the whole parcel, when the tenant in common, who did not join in the conveyance, sold and conveyed his interest to another stranger; it was held that the deed of such tenant in common was void.<sup>4</sup>

137. One in possession of land under a conveyance from an infant does not hold adversely within the meaning of the rule. The infant, upon arriving at full age, may disaffirm his deed made during his minority by merely making another conveyance of the same land to a third person. A purchaser from an infant takes his deed with knowledge that the infant seller had the right to disaffirm his deed upon attaining his majority, and he therefore is regarded as holding the land in the *interim*, not adversely, but subject to the right of the infant seller to disaffirm.<sup>5</sup>

138. This doctrine has no application to judicial or official sales, or conveyances made by public officers or agents in the line of their official duty. Such sales and conveyances are valid

<sup>1</sup> Williams v. Bennett, 4 Ired. 122; Mixer v. Woodcock, 154 Mass. 535, 28 N. E. Rep. 907.     Rep. 604; Adkins v. Whalin, 87 Ky. 153, 7 S. W. Rep. 912.

<sup>2</sup> Patterson v. Nixon, 79 Ind. 251.

<sup>4</sup> Adkins v. Whalin, 87 Ky. 153, 7 S. W. Rep. 912.

<sup>3</sup> Russell v. Doyle, 84 Ky. 386, 1 S. W.

<sup>5</sup> Moore v. Baker, 92 Ky. 518, 18 S. W. Rep. 363.

although there was an adverse possession at the time of the decree and sale.<sup>1</sup>

Moreover, the possession of the debtor whose land is seized upon execution, or of any one claiming under him, is not deemed to be adverse to the purchaser under the execution sale, but he may transmit to his vendee whatever estate was acquired by the purchase.<sup>2</sup> Nor is the possession of an officer under a writ of attachment such an adverse possession as to avoid a conveyance made by the owner of the land affected.<sup>3</sup>

This limitation is fully stated by the Supreme Court of Vermont: <sup>4</sup> "Where the conveyance is by operation of law, as by levy of execution,<sup>5</sup> or by an officer of the State or the United States,<sup>6</sup> or where a trust estate is conveyed to the uses for which it was originally created,<sup>7</sup> or where a conveyance is made by a trustee to his *cestui que trust*, as in the case of an administrator holding the title for the benefit of the heirs, and where a court of chancery would compel a conveyance,<sup>8</sup> the conveyance has not been considered as falling within the spirit, import, or operation of the statute, or as being within the mischief sought to be remedied by it, notwithstanding there was, at the time of the execution of the conveyance, an adverse possession by a stranger of the real estate conveyed. A conveyance by an administrator under the order of the probate court, or by an assignee in bankruptcy, or by a collector on the sale of land for taxes, would fall within the same rules of decision."

Sales by assignees or trustees under bankrupt or insolvent laws are in the nature of judicial sales, and are not open to objection because the land is adversely held at the time.<sup>9</sup>

<sup>1</sup> Tuttle v. Jackson, 6 Wend. 213; Webb v. Thompson, 23 Ind. 423; McGill v. Doe, 9 Ind. 306; Vannoy v. Bleasing, 36 Ind. 349; Patterson v. Nixon, 79 Ind. 251; Hanna v. Renfro, 32 Miss. 125; Arnold v. Stephens (Ky.), 17 S. W. Rep. 859; Preston v. Brackinridge, 86 Ky. 619, 6 S. W. Rep. 641; Frizzle v. Veach, 1 Dana, 211; Violet v. Violet, 2 Dana, 323; Little v. Bishop, 9 B. Mon. 240; Batterton v. Chiles, 12 B. Mon. 348; Sims v. Cross, 10 Yerg. 460; Mitchell v. Lipe, 8 Yerg. 179; Jarrett v. Tomlinson, 3 Watts & S. 114.

<sup>2</sup> Jackson v. Collins, 3 Cow. 89; Cook v. Travis, 20 N. Y. 400; Webb v. Thomp-

son, 23 Ind. 423, 432; Foust v. Moorman, 2 Ind. 17; Mitchell v. Lipe, 8 Yerg. 179, 29 Am. Dec. 116; Snowden v. McKinney, 7 B. Mon. 258.

<sup>3</sup> Winstanley v. Stipp, 132 Ind. 548, 32 N. E. Rep. 302.

<sup>4</sup> White v. Fuller, 38 Vt. 193, 203, per Kellogg, J.

<sup>5</sup> Farnsworth v. Converse, 1 D. Chip. 139.

<sup>6</sup> Aldis v. Burdick, 8 Vt. 21.

<sup>7</sup> Mitchell v. Stevens, 1 Aik. 16.

<sup>8</sup> Appleton v. Edson, 8 Vt. 239.

<sup>9</sup> Hoyt v. Thompson, 5 N. Y. 320; Smith v. Scholtz, 68 N. Y. 41.

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Deeds of executors, administrators, and guardians given in execution of their trusts are valid notwithstanding the possession of adverse claimants.<sup>1</sup>

But a sale and conveyance of land in the adverse possession of a third person, made by commissioners under an order of court in a suit for partition, to which the person holding adverse possession was not a party, is void.<sup>2</sup>

The fact that a religious corporation, having only a limited capacity to convey, makes a conveyance in pursuance of an order of court obtained on its application, does not make the transaction a judicial sale, so as to take it out of the operation of the statute.<sup>3</sup>

A grant of land by a State will pass the title notwithstanding the land is held in adverse possession, for the State cannot be disseised.<sup>4</sup>

139. It seems to have been uncertain whether the doctrine of adverse possession has any application to wills. In Massachusetts, in early cases, it was held that a devise of land of which the devisor was disseised was void.<sup>5</sup> But it was afterwards provided by statute that land of which the devisor is disseised, and to which he had only a right of entry, shall pass to the devisee in like manner as it would have descended to the testator's heirs if he had died intestate.<sup>6</sup> In Kentucky the statute against the conveyance of pretended titles was held to have no application to wills.<sup>7</sup>

140. A deed by a person disseised is valid as to the grantor and his heirs, and as against every one but the disseisor and his privies in estate.<sup>8</sup> It entitles the grantee to maintain an action to recover the land in the name of the grantor, but to his own use,

<sup>1</sup> *Barney v. Cuttler*, 1 Root, 489.

<sup>2</sup> *Jackson v. Vrooman*, 13 Johns. 488; *Martin v. Pace*, 6 Blackf. 99.

<sup>3</sup> *Christie v. Gage*, 71 N. Y. 189.

<sup>4</sup> *Ward v. Bartholomew*, 6 Pick. 409; *People v. Mayor of New York*, 28 Barb. 240; *Jackson v. Gumaer*, 2 Cow. 552; *Allen v. Hoyt, Kirby* (Conn.), 221.

<sup>5</sup> *Poor v. Robinson*, 10 Mass. 131; *Ward v. Fuller*, 15 Pick. 185.

<sup>6</sup> R. S. 1882, ch. 127, § 26; *Brown v. Wells*, 12 Met. 501, 503.

<sup>7</sup> *May v. Slaughter*, 3 A. K. Marsh. 505, 507.

<sup>8</sup> *McMahan v. Bowe*, 114 Mass. 140;

*Brinley v. Whiting*, 5 Pick. 348; *Williams v. Jackson*, 5 Johns. 489; *Van Hoesen v. Benham*, 15 Wend. 164; *Livingston v. Proseus*, 2 Hill, 526; *University of Vermont v. Joslyn*, 21 Vt. 52; *Park v. Pratt*, 38 Vt. 545; *Johnson v. Cook*, 73 Ala. 537, 541; *Betsey v. Torrance*, 34 Miss. 132; *Patterson v. Nixon*, 79 Ind. 251; *Hall v. Westcott*, 15 R. I. 373, 5 Atl. Rep. 629; *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Webb v. Marsh*, 22 Can. S. C. 437.

even against the disseisor.<sup>1</sup> For this purpose the title remains in the legal grantor, while the equitable title is in the grantee, and this title will be protected against any interference on the part of the grantor.<sup>2</sup>

The grantor cannot be heard to allege against his own deed that at the time of its execution the land was adversely held by another.<sup>3</sup>

<sup>1</sup> *McMahan v. Bowe*, 114 Mass. 140; *Pearce v. Moore*, 114 N. Y. 256, 21 N. E. Rep. 419; *Livingston v. Proseus*, 2 Hill, 526; *Van Voorhis v. Kelly*, 31 Hun, 293; *Snow v. Orleans*, 126 Mass. 453, 457; *Farnum v. Peterson*, 111 Mass. 148; *Wade v. Lindsey*, 6 Met. 407, 414; *Sparhawk v. Nelson v. Brush*, 22 Fla. 374; *Betsey v. Bagg*, 16 Gray, 583; *Cleaveland v. Flagg*, 4 Cush. 76; *Brinley v. Whiting*, 5 Pick. 348; *University of Vermont v. Joslyn*, 21 Vt. 52; *Edwards v. Roys*, 18 Vt. 473; *Park v. Pratt*, 38 Vt. 545, 553; *Key v. Snow*, 90 Tenn. 663, 671, 18 S. W. Rep. 251; *Steeple v. Downing*, 60 Ind. 478, 484;

*Pearce v. Moore*, 114 N. Y. 256, 21 N. E. Rep. 419; *Livingston v. Proseus*, 2 Hill, 526; *Van Voorhis v. Kelly*, 31 Hun, 293; *Nelson v. Brush*, 22 Fla. 374; *Betsey v. Bagg*, 16 Gray, 583; *Cleaveland v. Flagg*, 4 Cush. 76; *Brinley v. Whiting*, 5 Pick. 348; *University of Vermont v. Joslyn*, 21 Vt. 52; *Edwards v. Roys*, 18 Vt. 473; *Park v. Pratt*, 38 Vt. 545, 553; *Key v. Snow*, 90 Tenn. 663, 671, 18 S. W. Rep. 251; *Steeple v. Downing*, 60 Ind. 478, 484;

<sup>2</sup> *Edwards v. Parkhurst*, 21 Vt. 472; *Park v. Pratt*, 38 Vt. 545, 553.

<sup>3</sup> *Ruffin v. Johnson*, 5 Heisk. 604.

## CHAPTER VIII.

### CAPACITY OF CORPORATIONS AS VENDORS.

I. Power to sell and convey, 141-143. | II. Power to mortgage, 144-153.

#### I. *Power to Sell and Convey.*

141. Every private corporation having no public functions has the absolute right to dispose of its property in the same manner that an individual has. It may convey its real property acting by a majority of its stockholders; and this right is not limited as to objects, circumstances, or quantity, unless restrained by statute or by public policy.<sup>1</sup> It may dispose of all its property and close its business.<sup>2</sup> It may dispose of any interest in its property. Having an estate in fee, it can grant a lesser interest, such as an estate for life or for years. To carry out the specific purposes for which the corporation was created, it may deal with its property and convey it as an individual might.<sup>3</sup>

142. The power of a corporation to alienate its property depends very much upon its character, whether it is public, quasi-public, or strictly private. Thus, public municipal corporations cannot alienate property of a public nature, such, for instance, as a public square or street, in violation of the trusts, express or implied, upon which it is held, except under legislative authority.<sup>4</sup> They may, however, dispose of their lands which are of a private nature, unless restrained by charter or by statute.

<sup>1</sup> *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393, 66 Am. Dec. 490; *Sargent v. Webster*, 13 Met. 497; *Burton's App.* 57 Pa. St. 213; *Walker v. Vincent*, 19 Pa. St. 369; *Hodges v. New England Screw Co.* 1 R. I. 312, 347; *Pierce v. Emery*, 32 N. H. 486, 503; *Reichwald v. Commercial Hotel Co.* 106 Ill. 439, 5 Am. & Eng. Corp. Cas. 248; *Reynolds v. Stark Co.* 5 Ohio, 204, 205; *Binney's Case*, 2 Bland Ch. 99, 142; *White Water Val. Canal Co. v.*

*Vallette*, 21 How. 414, 425, per Campbell.

<sup>2</sup> *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393, 66 Am. Dec. 490; *Dupee v. Boston Water Power Co.* 114 Mass. 37; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543.

<sup>3</sup> *Barry v. Merchant Exch. Co.* 1 Sandf. Ch. 280.

<sup>4</sup> *Dillon's Municipal Corp.* § 575.

A corporation may be technically private, and yet, by reason of having by legislative authority the right of eminent domain, may have a quasi-public character, and be subject to a like obligation with a public municipal corporation to hold and use its property, acquired by public authority, as a trust, to a certain extent, for the public. Such a corporation can sell and convey its lands so acquired, which are essential to the carrying out of the purposes for which the corporation was created, only by legislative authority. A charitable or religious corporation may be under an obligation to discharge its corporate duties, and may be compelled to appropriate its property to the specific uses for which it was allowed by its charter or by statute to acquire it. But a corporation of a strictly private character, one which has derived nothing from the government except its charter, and has no public function, but whose sole object is to promote the private interests of its stockholders, has the same power as a natural person to convey its lands as its interests may demand.

The public may have an interest in the continued existence of a private corporation, though it has not strictly any public functions. Thus a corporation organized for the purpose of owning ditches and selling water is a strictly private corporation, and may at its own discretion sell and convey any part or all of its property.<sup>1</sup> The public have no right to say that a private corporation shall not dispose of its property, however convenient or desirable it may be that it shall continue to exercise its corporate functions, unless the corporation has acquired its property through the sovereign authority of the State.

But a railroad company is a quasi-public corporation, and is not allowed to divest itself of its right of way, and land necessary for the exercise of its franchise, without legislative permission.<sup>2</sup>

<sup>1</sup> *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

<sup>2</sup> *Gardner v. London, C. & D. Ry. Co.* L. R. 2 Ch. App. 201; *Myatt v. St. Helen's, &c. Ry. Co.* 2 Q. B. 364; *Beman v. Rufford*, 1 Sim. N. S. 550; *Hart v. Eastern Union Ry. Co.* 7 Ex. 246; *Penn Co. v. St. Louis, &c. R. Co.* 118 U. S. 290; *Thomas v. Railroad Co.* 101 U. S. 71; *Branch v. Jesup*, 106 U. S. 468; *York, &c. R. Co. v. Winans*, 17 How. 30; *Atlantic & Pac. Tel. Co. v. Union Pac. R. Co.*

1 *McCrary*, 541; *Richards v. Merrimack, &c. R.* 44 N. H. 127; *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393, 66 Am. Dec. 490; *Middlesex, &c. R. Co. v. Boston, &c. R. Co.* 115 Mass. 347; *Singleton v. Southwestern R.* 70 Ga. 464, 48 Am. Rep. 574; *Hays v. Ottawa, &c. R. Co.* 61 Ill. 422; *State v. Consolidation Coal Co.* 46 Md. 1; *Tippecanoe Co. v. Lafayette, &c. R. Co.* 50 Ind. 85; *McAllister v. Plant*, 54 Miss. 106, 119; *Arthur v. Commercial & R. Bank*, 9 S. & M. 394, 431, 48

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To permit such a transfer of its property is contrary to public policy. It would necessarily disable the corporation from performing its duty to the public.<sup>1</sup>

143. A foreign corporation authorized to hold real estate may convey or mortgage it according to the form in use in the State where the land is situated. The law of the place where the land is situated governs as to the mode of transfer, but the authority to make the transfer is derived from the State creating the corporation.<sup>2</sup>

A foreign corporation may make a valid assignment of its property for the benefit of its creditors, although it has not complied with the constitution and laws of the State in relation to transacting business and owning and disposing of property within such State.<sup>3</sup> The acts of such a corporation are not void, and cannot be questioned and determined collaterally. As regards any usurpation of power by such a corporation, it rests with the State in a direct proceeding to prevent it from exercising its franchises within the State until it has fully complied with its constitution and laws.

## II. *Power to Mortgage.*

144. Ordinary private corporations having no public functions may mortgage their real property for the purpose of securing their legitimate debts, or to secure loans obtained for transacting their legitimate business.<sup>4</sup> This power is incidental,

Am. Dec. 719; *Tray, &c. R. Co. v. Kerr*, 17 Barb. 581; *Black v. Del. & R. Canal Co.* 22 N. J. Eq. 130, 399, 24 N. J. Eq. 455; *Stewart's App.* 56 Pa. St. 413; *Russell v. Texas & P. Ry. Co.* 68 Tex. 646, 5 S. W. Rep. 686; *Gulf, &c. Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. Rep. 156; *Naglee v. Alexandria & T. Ry. Co.* 83 Va. 707, 3 S. E. Rep. 369.

<sup>1</sup> *Pierce v. Emery*, 32 N. H. 486, 504; *Richards v. Merrimack & C. R.* 44 N. H. 127, 136.

<sup>2</sup> *Saltmarsh v. Spaulding*, 147 Mass. 224, 20 Am. & Eng. Corp. Cas. 514, 17 N. E. Rep. 316.

<sup>3</sup> *Wright v. Lee*, 2 S. Dak. 596, 51 N. W. Rep. 706, and on rehearing, 55 N. W. Rep. 931.

<sup>4</sup> *Bank of Australasia v. Breillat*, 6 Moore P. C. 152; *In re General Prov. Ass. Co. L. R.* 14 Eq. 507; *In re General So. Am. Co. L. R.* 2 Ch. D. 337; *In re Patent File Co. L. R.* 6 Ch. App. 83, 88; *Nelson v. Eaton*, 26 N. Y. 410; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Curtis v. Leavitt*, 15 N. Y. 9; *Partridge v. Badger*, 25 Barb. 146; *Jackson v. Brown*, 5 Wend. 590; *Barry v. Merchants' Exch. Co.* 1 Sandf. Ch. 280; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Gordon v. Preston*, 1 Watts, 385, 26 Am. Rep. 75; *Watt's App.* 78 Pa. St. 370; *Detroit v. Mut. Gas Light Co.* 43 Mich. 594, 5 N. W. Rep. 1039; *Thompson v. Lambert*, 44 Iowa, 239; *Reichwald v. Commercial Hotel Co.* 106 Ill. 439, 5 Am. & Eng.

and need not be expressly conferred. Corporations not expressly or impliedly restrained by the nature of their undertaking may borrow money to carry out the legitimate objects of their incorporation, and secure the payment of it by a mortgage of their property.<sup>1</sup> Thus, for instance, a corporation organized for the purpose of manufacturing and supplying gas to the inhabitants of a city or village is under no restriction in this respect arising by implication from the nature of the business it was created to engage in.<sup>2</sup> This restriction upon the right of a corporation to alienate its property arises, not from the fact that it subserves a public use and is beneficial, or, it may be, necessary to the general public, but it applies only when the State, in view of the public purpose of a corporation, has conferred upon it special privileges, of which the right of eminent domain is generally the most important.

In many States, express authority to mortgage is given by statute, though in some States this authority is coupled with restrictions. Foreign corporations in some States are not permitted to mortgage to the exclusion or injury of citizens of the State.

**145.** A corporation created for a public purpose cannot mortgage its land, acquired by the exercise of the right of eminent domain, without legislative authority. Inasmuch as every mortgage may in the end result in an absolute transfer of the mortgaged property, it follows that such a corporation cannot without special authority mortgage its property and give to the mortgagee, upon default, the right to exercise its public duties and functions, or the power to sell and convey these privileges to another.<sup>3</sup> A mortgage made by such a corporation of all its

Corp. Cas. 248; *Wood v. Whelen*, 93 Ill. 153; *West v. Madison Co. Ag. Board*, 82 Ill. 205; *Aurora Ag. Soc. v. Paddock*, 80 Ill. 263; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Burt v. Rattle*, 31 Ohio St. 116; *Larwell v. Hanover Sav. Fund Soc.* 40 Ohio St. 274, 282; *Lehman v. Tallassee Manuf. Co.* 64 Ala. 567.

<sup>1</sup> *Curtis v. Leavitt*, 15 N. Y. 9; *Straus v. Eagle Ins. Co.* 5 Ohio St. 59; *Monument National Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

<sup>2</sup> *Hays v. Galion Gas, &c. Co.* 29 Ohio St. 330.

<sup>3</sup> *Jones' Corp. Bonds and Mortgages*, §§ 1-26; *Carpenter v. Black Hawk G. M. Co.* 65 N. Y. 43, 50; *Pullan v. Cincinnati, &c. R. Co.* 4 Biss. 35; *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27, 42 Am. Dec. 315; *Pierce v. Emery*, 32 N. H. 484; *Arthur v. Commercial & R. Bank*, 9 S. & M. 394, 48 Am. Dec. 719; *Atkinson v. Marietta, &c. R. Co.* 15 Ohio St. 21; *Stewart v. Jones*, 40 Mo. 140; *New Orleans, &c. R. Co. v. Harris*, 27 Miss. 517; *Hall v. Sullivan R. Co.* 21 Law Rep. 138; *Daniels v. Hart*, 118 Mass. 543; *Wood v. Bedford, &c. R. Co.* 8 Phila. 94; *State v. Mexican Gulf Ry. Co.* 3 Rob. (La.) 513;



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property, without distinct legislative authority, is wholly void and inoperative, because it is in violation of the public policy of the State.<sup>1</sup>

146. Land of a railroad company not acquired under the delegated right of eminent domain, or so connected with the franchise to operate and manage a railroad that the alienation would tend to disable the corporation from performing the public duties imposed upon it, and in consideration of which its chartered privileges had been conferred, may be conveyed or mortgaged by the company without special authority, under the general right of corporations at common law to dispose of whatever property they have power to acquire.<sup>2</sup> If the company should include in one deed or mortgage both real estate not connected with its franchises and real estate essential to the exercise and enjoyment of its franchises, as for instance a portion of its roadway, the conveyance might be upheld as to the former, and treated as inoperative and void as to the latter. The ordinary rule is applied that, if the part of the subject of the conveyance which is valid can be separated from that which is void, the conveyance will be carried into effect so far as it can be. As to property not acquired for the purposes of the road, the corporation stands in the relation of an ordinary trading corporation which has no public obligations.

147. A power to sell generally includes a power to mortgage.<sup>3</sup> Thus a charter conferring the right "to acquire, aliene, transfer, and dispose of property of every kind," confers the power to mortgage it. But this is affirmed of the property of the company as distinguished from its franchises.<sup>4</sup> The power to mortgage would, however, generally include the franchises necessary to use and enjoy the property, as distinguished from the franchise

*Commonwealth v. Smith*, 10 Allen, 448, 87 Am. Dec. 672. And see *East Boston, &c. R. Co. v. Eastern, &c. R. Co.* 13 Allen, 422; *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700.

This doctrine is substantially denied in Maine. *Shepley v. Atlantic, &c. Co.* 55 Me. 395; *Kennebec, &c. R. Co. v. Portland, &c. Co.* 59 Me. 9, 23.

<sup>1</sup> *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700.

<sup>2</sup> *Hendee v. Pinkerton*, 14 Allen, 381;

*Platt v. Union Pac. R. Co.* 99 U. S. 48, 58; *Branch v. Jesup*, 106 U. S. 468, 478, 1 S. Ct. Rep. 495; *Farnsworth v. Minn. &c. R. Co.* 92 U. S. 49; *Tucker v. Ferguson*, 22 Wall. 527, 572.

<sup>3</sup> *Willamette Manuf. Co. v. Bank of British Columbia*, 119 U. S. 191, 7 S. Ct. Rep. 187.

<sup>4</sup> *McAllister v. Plant*, 54 Miss. 106; *Branch v. Atlantic, &c. R. Co.* 3 Woods, 481.

to be a corporation.<sup>1</sup> The words "dispose of" used in the act incorporating the Union Pacific Railroad Company, in reference to lands granted to the company, are apt words to indicate a transfer by mortgage. They contemplate a use of the lands granted different from the sale of them.<sup>2</sup>

148. A corporation may have authority to mortgage its property, but no authority to mortgage its franchises. Legislative authority to mortgage may apply to the property of a corporation and not to its franchises. If a corporation, having power by its charter to pledge its real estate or its property and profits, executes a mortgage covering not only these, but also its franchises to be a corporation, such mortgage is not for that reason entirely void, but it operates to convey the property of the company,<sup>3</sup> while it is ineffectual to transfer its franchises.<sup>4</sup> Under a statute providing that corporations for manufacturing, mining, mechanical, or chemical purposes shall not mortgage any property except real estate, and shall not do this except to secure the payment of debts, a mortgage by such corporation to secure bonds is valid so far as the bonds are used for the payment of its debts, even though invalid so far as the bonds are used to raise money to carry on its operations.<sup>5</sup> It is doubtless true that the bonds not used for this purpose would be valid in the hands of *bona fide* holders, and that as against such holders the company would be estopped from claiming the invalidity of the mortgage.<sup>6</sup>

149. Under a power to mortgage expressly conferred, it is sufficient that the scope and purpose of the power are substantially met. Under authority conferred to mortgage for the purposes of the business of the corporation, a mortgage may be made to secure future advances.<sup>7</sup> Under a statute authorizing any railroad corporation to borrow money "for completing, furnishing, and operating its road," and to issue bonds therefor, secured by a mortgage of its property and franchise, a mortgage which appeared upon its face to be "made to consolidate its

<sup>1</sup> *Branch v. Atlantic, &c. R. Co.* 3 65 N. Y. 43; *Central G. Min. Co. v. Platt, Woods*, 481; *Wayne v. Myddleton*, 2 3 Daly, 263.  
*Kelly (Ga.)*, 383.

<sup>2</sup> *Platt v. Union, &c. R. Co.* 99 U. S. 65 N. Y. 43.  
 48.

<sup>3</sup> *Randolph v. W. &c. R. Co.* 11 Phila. 127.  
 502.

<sup>4</sup> *Carpenter v. Black Hawk G. Min. Co.* 101 U. S. 622.  
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<sup>5</sup> *Carpenter v. Black Hawk G. Min. Co.*

<sup>6</sup> *Dimpfel v. Ohio & M. Ry. Co.* 9 Biss.

<sup>7</sup> *Jones v. Guaranty & Indemnity Co.*

funded debt, obtain the money and material necessary for perfecting its line of railway, enlarging its capacities, and extending the facilities thereof," is within the scope of the powers conferred. Without other proof of the object of the mortgage, no suit to restrain the making of it, or the issuing of bonds under it, can be maintained by a common stockholder, or by a preferred stockholder, of the corporation. For aught that appears in the case, the funded debt and other debts may have been incurred in constructing and operating the road, and the excess of money sought to be obtained by such bonds may be necessary further to complete and operate the same.<sup>1</sup>

But authority to mortgage for the purpose of constructing a railroad confers no right to secure by mortgage the debt of another. A railroad company having authority to borrow such sums of money as might be expedient for completing, maintaining, and working the railway, and to make bonds, debentures, or other securities, and sell the same, and to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property of the company, for the due payment of such sums and the interest thereon,<sup>2</sup> cannot make a mortgage for any purpose not embraced in the terms of the act, and therefore cannot make a mortgage to secure a debt which is not a debt of the company. When the express purpose for which a mortgage is authorized to be given is the repayment of a loan of money for the completion or maintenance of the road, a mortgage to secure the debt of another, though it may be for the benefit of the company to make it, is *ultra vires* and void.<sup>3</sup>

Under an authority given by charter or by statute to borrow money, a corporation has no right to raise money by the issue of irredeemable bonds entitling the holder merely to a share of the earnings after the payment of certain dividends to the stockholders. Money so obtained could not be regarded as borrowed, because that term implies reimbursement.<sup>4</sup>

**150.** An express authority to mortgage for certain purposes does not necessarily negative or qualify a general authority to borrow and mortgage for other purposes, for

<sup>1</sup> *Thompson v. Erie Ry. Co.* 42 How. Pr. 68, 11 Abb. Pr. (N. S.) 188.

<sup>2</sup> *Railway Act of Ontario*, § 9, sub-sec. 11.

<sup>3</sup> *Grand Junction Ry. Co. v. Bickford*, 23 Grant's Ch. (Ont.) 302.

<sup>4</sup> *Taylor v. Phila. &c. R. Co.* 7 Fed. Rep. 386.

which the implied powers of a corporation are usually sufficient.<sup>1</sup> But an express power to mortgage would seem to negative an implied power for the same purpose. If there is an express power to mortgage for a certain amount, there can be no implied power beyond this amount.<sup>2</sup> Under authority given to a corporation to mortgage its real and personal property to secure the payment of any debt contracted by it in the business for which it was incorporated, a mortgage may be given to secure a debt contracted simultaneously with the giving of the security, if incurred for the prosecution of the legitimate business of the company.<sup>3</sup> A mortgage may be given also to secure bonds issued and delivered to creditors of the company, or sold to raise money to pay them, or to raise money for its legitimate business purposes.<sup>4</sup>

151. If a corporation makes a sale or mortgage which is *ultra vires*, it cannot avail itself of the illegality of the transaction to defeat the conveyance.<sup>5</sup> An executed transaction must be allowed to stand against the corporation when the rules of good faith require it.<sup>6</sup> Although a transfer of the property of a corporation may have been *ultra vires*, the corporation cannot upon its own motion, without due process of law and a return of the consideration received, take possession of the property. A court of equity will restrain it by injunction.<sup>7</sup>

A mortgage made by a corporation whose articles of incorporation provide "that it shall be competent to mortgage the property of the company to the amount of not exceeding one half of the capital stock actually paid in," is not *ultra vires* and invalid though given for a greater amount.<sup>8</sup> "The general rule is, that the plea of *ultra vires* shall not prevail when, instead of advancing justice, it would accomplish a wrong; and it makes no difference, in this respect, whether it is interposed for or against a corporation."<sup>9</sup>

<sup>1</sup> *Allen v. Montgomery R. Co.* 11 Ala. 437; *Mobile, &c. R. Co. v. Talman*, 15 Ala. 472; *Phillips v. Winalow*, 18 B. Mon. 431, 68 Am. Dec. 729.

<sup>2</sup> *Brice, Ultra Vires*, 2d Eng. ed. 273.

<sup>3</sup> *Lord v. Yonkers Fuel Gas Co.* 99 N. Y. 547.

<sup>4</sup> *Carpenter v. Black Hawk Min. Co.* 65 N. Y. 43; *Lord v. Yonkers Fuel Gas Co.* 99 N. Y. 547. And see *Jones v. Guaranty and Indemnity Co.* 101 U. S. 622.

<sup>5</sup> *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

<sup>6</sup> *Parish v. Wheeler*, 22 N. Y. 494.

<sup>7</sup> *Atlantic & Pac. Tel. Co. v. Union Pac. Ry. Co.* 1 McCrary, 541.

<sup>8</sup> *Warfield v. Marshall Canning Co.* 72 Iowa, 666, 34 N. W. Rep. 467, 19 Am. & Eng. Corp. Cas. 194, 2 Am. St. Rep. 263; *Garrett v. Burlington Plow Co.* 70 Iowa, 697, 29 N. W. Rep. 395, 59 Am. Rep. 461.

<sup>9</sup> *Darst v. Gale*, 83 Ill. 136, 140; *Alexan-*

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If a corporation is restricted to borrowing a limited amount upon mortgage of its lands, the restriction is strictly enforced by the English courts, and a mortgage by such corporation for a greater amount is good for only the amount named. There is in such case an implied restriction against mortgaging the land for more than the sum named in the statute or the act of incorporation.<sup>1</sup> A mortgage beyond the borrowing powers of the corporation cannot be ratified by the individual members of the corporation, even if every one expressly assents to it. They cannot ratify an act which the corporation is not clothed with any capacity to do. They cannot make valid against the corporation a mortgage which it had no capacity to make.

152. Though an individual cannot question the power of a corporation to acquire and hold land, he can question its right to dispose of it, when his rights would be interfered with by the corporation's divesting itself of the power to perform its duties to the public. "The right and power of such a corporation to dispose of the property necessary to the exercise of its franchise, and the right of such corporation to hold property conveyed to it which by the terms of its charter it is not authorized to purchase, so far as individuals are concerned, stand on different grounds. In the one case the individual has no interest in the question, while in the other it is his right to have the corporation discharge its duty to the public; and, for any failure to do so, by which he receives injury, he may look to the corporation and its property for compensation, notwithstanding the corporation has attempted to divest itself of its corporate existence, franchise, and property."<sup>2</sup>

153. A mortgage by a corporation made without the assent or vote of a certain portion of its stockholders, as required by statute, can be attacked only by the corporators. Objection to its validity cannot be made by the corporation itself in defence to a suit to foreclose the mortgage. Such a provision is for the protection of the stockholders, and they alone are wronged by the

der v. Tolleston Club, 110 Ill. 65; Third R. 36 Ch. D. 674; Regina v. Reed, L. R. Av. Sav. Bk. v. Dimock, 24 N. J. Eq. 26; 5 Q. B. Div. 483, 488; M'Cormick v. Parry, Beekman v. Hudson River, &c. Ry. Co. 7 Exch. 355; Chapleo v. Brunswick Build. Soc. 6 Q. B. Div. 696, 713.

35 Fed. Rep. 3; Texas Western Ry. Co. v. Gentry, 69 Tex. 625, 8 S. W. Rep. 98. <sup>2</sup> Russell v. Texas & P. Ry. Co. 68 Tex. 646, 653, 5 S. W. Rep. 686, per Stayton, J.

<sup>1</sup> Jones on Corp. Bonds & Mortg. § 20; Baroness Wenlock v. River Dee Co. L.

execution of a mortgage in violation of the statute, and they alone can raise the question of the validity of the mortgage. The corporation is estopped from setting up the defence of *ultra vires* when the party dealing with it could not, from anything appearing upon the face of the paper, be presumed to know that the corporation had exceeded its power.<sup>1</sup>

<sup>1</sup> *Beecher v. Rolling Mill Co.* 45 Mich. Gas Coal Co. 37 W. Va. 73, 16 S. W. 103, 7 N. W. Rep. 695; *Boyce v. Montauk* Rep. 501.

## CHAPTER IX.

### CAPACITY OF TENANTS IN TAIL AS VENDORS.

154. An estate tail under the statute *de donis* was inalienable. The tenant in tail could convey no interest greater than his life estate, and after him the estate descended to "the heirs of his body," or to other lineal heirs described in the deed of the donor. Before the enactment of this statute in 1285, an estate granted to one "and the heirs of his body" was a conditional fee. The condition was an implied one, that, if the grantee should die without issue of the prescribed class, or if there should be a subsequent failure of such issue, the land should revert to the donor. Until the happening of this event the estate of the grantee was in effect an estate for his life, though coupled with a further estate of inheritance, conditional on there being issue of the prescribed class to inherit according to the terms of the gift. The heir, however, did not take by virtue of the deed to his ancestor, but by descent from him. This was the rule as early as the reign of Henry III.<sup>1</sup> Inasmuch as an ordinary grant to a man and his heirs enabled him to convey the land in fee simple, so a grantee of a conditional fee, such as described above, upon the birth of issue who could inherit, became entitled to convey the land absolutely in fee simple, and thus bar not only his own issue, but also his donor's right of reverter. "These estates, therefore, upon the happening of the condition, differed from ordinary estates in fee simple only in the restricted character of their devolution to the class of heirs named in the gift. So soon as the condition was performed by the birth of issue, the tenant could alienate and convey an estate in fee simple. . . . If, however, the land was not alienated, it would descend, not according to the ordinary rules affecting inheritances, but according to the mode expressed in the gift. It can hardly be doubted that this strained construction was put upon such gifts in order to favor

<sup>1</sup> Bracton, Lib. 3, cap. 6, fol. 17 A.

the practice of alienation, which was dear to the common lawyer and to the great mass of landowners, though abhorrent to the *domini capitales*.”<sup>1</sup>

To stop the practice of alienating these conditional estates, the statute *de donis conditionalibus* was passed in the year 1285.<sup>2</sup> The statute, after reciting at length the reasons for its enactment, says: “Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed, so that they to whom the land was given under such conditions shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs, if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing.”

The effect of the statute was to render the estate inalienable, and descendible only to the issue named in the grant. The grantee could convey a title good only to the extent of his own interest, that is, an estate for his life determinable by the entry of the heir, if such there should be, or, in default of such issue, by entry of the donor. The estate of such grantee was designated an estate tail, *feudum talliatum*, being a portion of an estate cut off from the fee. “As time went on, the great inconvenience of such a restriction was strongly felt. Titles were insecure, for an old entail, of which nothing was known, might be brought to light; nor would any period of enjoyment, however long, afford an answer to such a claim. ‘Farmers were ousted of their leases, creditors defrauded of their debts.’ The free alienation of land was restrained, a grievance which was probably felt with increasing severity in consequence of the impoverishment of the landowners caused by the Wars of the Roses. The king, too, suffered by the protection against forfeiture which the practice afforded to the issue of a traitor. Thus all members of the community, except perhaps the great landowners themselves, were interested in obtaining a relaxation of the practice of strictly entailing lands.”<sup>3</sup>

<sup>1</sup> Digby's Hist. Law of Real Prop. 4th ed. p. 221.

<sup>2</sup> Digby's Hist. Law of Real Prop. 4th ed. p. 250.

<sup>3</sup> 13 Edw. I. ch. 1.



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After the restriction upon the free alienation of estates had continued for two hundred years, it was finally in great part broken down by the courts, first by the process of "levying a fine," and afterwards by the more effectual means of a "common recovery," which came into use after the famous *Taltarum's Case* in 1472.<sup>1</sup> In England, from this time till 1834, the common mode of barring an entail and making a conveyance of the estate in fee simple was "to suffer a recovery." After the latter date the tenant in tail might convey the estate absolutely in fee simple by deed.

155. In this country estates tail were early introduced as a part of the common law, and with them came the remedy of a common recovery. This mode of barring the entail and converting the title into an estate in fee simple was in use during the colonial period, and in some of the States long after the Revolution. Entailed estates were never at any period in much favor, and as time has gone on they have become less in favor than formerly. At the present day, estates tail in most of the States either have been by statute converted into estates in fee simple, or the tenant in tail has been empowered to bar the entail by a conveyance in fee simple.

In many States all estates which at common law would be adjudged to be estates in fee tail are declared by statute to be estates in fee simple.<sup>2</sup> The grantee in tail has the same power over such an estate as over an absolute estate in fee.

<sup>1</sup> See *Alienation of Estates Tail*, by Howard W. Elphinstone, 6 *Law Quart. Rev.* 280.

<sup>2</sup> *Alabama*: Code 1886, § 1825; *Sullivan v. McLaughlin*, 99 Ala. 60, 11 So. Rep. 477. *California*: Civil Code, § 763. The statute does not apply to an instrument conveying only a life estate. *Barnett v. Barnett* (Cal.), 37 Pac. Rep. 1049. A vested remainder in fee may be limited upon such estate. § 764. *Florida*: R. S. 1892, § 1818. *Georgia*: Code 1882, § 2250; *Baird v. Brookin*, 86 Ga. 709, 12 S. E. Rep. 981; *Beers v. Estill* (Ga.), 9 S. E. Rep. 596. *Indiana*: R. S. 1894, § 3378. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent

estate. § 3380. *McIlhinny v. McIlhinny* (Ind.), 37 N. E. Rep. 147; *Allen v. Craft*, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425. *Kentucky*: G. L. 1894, § 2343; *Breckinridge v. Denny*, 8 Bush, 523; *Brann v. Elzey*, 83 Ky. 440. The statute does not apply to a life estate merely. *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. Rep. 904. *Michigan*: Annot. Stats. 1882, § 5519. A remainder may be limited upon such estate, § 5520. *Minnesota*: G. S. 1894, § 4364. *Mississippi*: Annot. Code 1892, § 2436; *Jordan v. Roach*, 32 Miss. 481; *Dibrell v. Carlisle*, 48 Miss. 691. But a conveyance or devise may be made to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainder-man, and, in

In several States a person seised of lands as tenant in tail may convey them in fee simple by a deed in common form, in the same manner as if he were seised of the same in fee simple. Such conveyance bars the estate tail, and all remainders and reversions expectant thereon.<sup>1</sup> In these States, estates tail when created continue until the grantee conveys the land in fee simple. The statute does not itself convert estates tail into estates in fee simple, but empowers the grantee to do so.

A quitclaim deed is as effectual as any other to bar the entail, for it is sufficient to convey an estate in fee simple.<sup>2</sup>

Only the tenant in tail in possession, and not one in remainder, can bar the entail by his deed.<sup>3</sup>

A deed of an undivided interest bars the entail to the extent of such interest.<sup>4</sup>

Where lands are held by one person for life with a remainder in tail in another, the tenant for life and remainder-man may bar the entail by joining in a conveyance of the land in fee. But the tenant for life alone cannot by his deed bar the entail.<sup>5</sup>

In several other States the tenant in tail has no power of alienation beyond his life interest, the statutes declaring that, in cases where by common law any person may become seised in fee tail of any lands, such person, instead of being or becoming seised

default thereof, to the right heirs of the donor, in fee simple. **New Hampshire**: The statute *de donis* was impliedly repealed by statute of 1789, and estates tail abolished. *Jewell v. Warner*, 35 N. H. 176; *Dennett v. Dennett*, 40 N. H. 498, 500. **New York**: R. S. 1889, p. 2431, §§ 3, 4. A remainder in fee may be limited upon such estate. See *Van Reusselaer v. Kearney*, 11 How. 297. **North Carolina**: Code 1883, § 1325. **Oklahoma**: G. S. 1893, §§ 3700, 3701. **North Dakota**: Comp. Laws 1887, § 2736. There may be a vested remainder limited upon such estate. § 2737. **South Dakota**: Comp. Laws 1887, § 2736. There may be a vested remainder limited upon such estate. § 3737. **Tennessee**: Code 1884, § 2813. **Virginia**: Code 1887, § 2421. **West Virginia**: Code 1891, ch. 71, §§ 8, 9. **Wisconsin**: Annot. Stats. 1889, §§ 2027, 2028.

<sup>1</sup> **Delaware**: R. Code 1893, p. 631, ch. 83, § 27. **Maine**: R. S. 1883, ch. 73, § 4; *Wiley v. Haley*, 60 Me. 176. **Maryland**: Pub. G. L. 1888, art. 21, § 24. **Massachusetts**: P. S. 1882, ch. 120, § 15. **Pennsylvania**: Brightly's Purdon's Dig. 1894, p. 809. The deed must express an intent to bar the entail. **Rhode Island**: P. S. 1882, ch. 172, § 3. And see ch. 182, §§ 1, 2; *Manchester v. Durfee*, 5 R. I. 549.

<sup>2</sup> *Coombs v. Anderson*, 138 Mass. 376; *Allen v. Ashley School Fund*, 102 Mass. 262.

<sup>3</sup> *Whittaker v. Whittaker*, 99 Mass. 364; *Holland v. Craft*, 3 Gray, 162, 182; *Allen v. Ashley School Fund*, 102 Mass. 262.

<sup>4</sup> *Coombs v. Anderson*, 138 Mass. 376; *Hall v. Thayer*, 5 Gray, 523.

<sup>5</sup> *Wilson v. O'Connell*, 147 Mass. 17, 16 N. E. Rep. 578.

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thereof in fee tail, shall be adjudged to be and become seised thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass, according to the course of the common law, by virtue of such devise, gift, grant, or conveyance.<sup>1</sup>

There are no statutory provisions in regard to estates tail in Idaho, Iowa, Kansas, Montana, Nebraska, Nevada, Oregon, South Carolina, Texas, and Washington, but it is doubtful whether estates tail, as at common law, are preserved in any of them. In Wyoming it is provided that, in an action by the tenant in tail, the court may authorize a sale of the property when satisfied that a sale would be for the benefit of the person holding the first and present estate, and that no substantial injury would be done to the heirs in tail.<sup>2</sup>

<sup>1</sup> *Arkansas*: Dig. of Stats. 1884, § 643. *Descent*, p. 299, § 11. *New Mexico*: *Colorado*: Annot. Stats. 1891, § 432. *Comp. L.* 1884, § 1423. *Ohio*: R. S. 1892, *Connecticut*: G. S. 1888, § 2952. *Illinois*: § 4200. An ordinary deed does not bar. R. S. 1889, ch. 30, § 6; *Frazer v. Peoria* Pollock v. Speidel, 17 Ohio St. 439. *Vermont*: R. L. 1880, § 1916. *Co.* 74 Ill. 282; *Blair v. Vanblarcum*, 71 Ill. 290; *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. Rep. 505. *Missouri*: R. S. 1889, § 8836; *Reed v. Lane* (Mo.), 26 S. W. Rep. 957. *New Jersey*: 1 R. S. 1877; <sup>2</sup> R. S. 1887, §§ 3009-3019.

## BOOK I.—PART II.

### CAPACITY OF PERSONS AS PURCHASERS.

#### CHAPTER X.

##### CAPACITY OF PERSONS IN GENERAL.

156. No disability on the part of an individual grantee stands in the way of his taking title under a deed, though the disability be such that a deed made by him would be invalid.<sup>1</sup> Thus a conveyance may be made directly to an infant, and the title will vest in him upon the delivery of the deed.<sup>2</sup> Although the grantee even in a deed poll becomes a party to it by accepting it, yet its efficacy as a grant and conveyance is not derived from the act of the grantee in accepting it, but from the act of the grantor in executing it. The acceptance of a conveyance by the grantee is presumed, unless it imposes burdens upon him. The delivery may also be to a third person for the use of the grantee; it therefore follows that the efficacy of a deed does not depend upon the legal capacity of the grantee to transfer an estate by deed.<sup>3</sup>

157. A deed to an infant is of course voidable by him upon his coming of age.<sup>4</sup> If he repudiates his purchase he must reconvey the land; and he would doubtless be precluded from repudiating, and reclaiming the purchase-money, if anything has occurred to prevent his returning the property in substantially

<sup>1</sup> *Concord Bank v. Bellis*, 10 Cush. 276, Iowa, 241, 4 Am. Rep. 174; *Mitchell v. Ryan*, 3 Ohio St. 377, 386; *Spencer v. Carr*, 45 N. Y. 406, 410, 6 Am. Rep. 112; *Jackson v. Bodle*, 20 Johns. 184; *Rivard v. Walker*, 39 Ill. 413; *Masterson v. Cheek*, 23 Ill. 72; *Peavey v. Tilton*, 18 N. H. 151, 45 Am. Dec. 365, per Gilchrist, J.: "While a man cannot have an estate put into him in spite of his teeth, his assent to a conveyance is a legal presumption until the contrary appears."

<sup>2</sup> *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344; *Annis v. Wilson*, 15 Colo. 236, 25 Pac. Rep. 304; *Rivard v. Walker*, 39 Ill. 413; *Cecil v. Beaver*, 28 Iowa, 241, 4 Am. Rep. 174; *Griffith v. Schwenderman*, 27 Mo. 412.

<sup>3</sup> *Concord Bank v. Bellis*, 10 Cush. 276, 278, per Shaw, C. J.; *Cecil v. Beaver*, 28 Iowa, 241, 4 Am. Rep. 174; *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344.

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the same condition it was when it was conveyed to him.<sup>1</sup> It has been laid down, however, that an infant cannot recover money actually paid by him.<sup>2</sup>

**158. An infant grantee, by silently remaining in possession of the property after attaining his majority, affirms the conveyance.** If he wishes to disaffirm the transaction he should give notice of his intention to do so within a reasonable time after he has come of age.<sup>3</sup> This rule differs from that which applies in some States to a ratification by a grantor of his deed made during minority,<sup>4</sup> because the silent acquiescence of such grantor ordinarily occasions no injury to other persons, and secures no benefit to himself; but a grantee, by his silent acquiescence, obtains an advantage for himself in the enjoyment of the property, and consequently common justice imposes upon him a duty to make his election to disaffirm the purchase within a reasonable time.<sup>5</sup> If an infant makes an exchange of land, and after attaining full age continues to occupy the lands taken in exchange, he affirms the exchange.<sup>6</sup>

**159. An insane person is capable of taking title by deed.<sup>7</sup>** Although he may be incapable of making an intelligent acceptance of the deed, if the conveyance is beneficial to him his acceptance may be presumed; and a good delivery may always be made to a third person for the use of such grantee. If the deed imposes a liability or obligation upon the grantee, there is no presumption of acceptance by him. His purchase is of course voidable by him upon his recovery of a sound mind; and it is voidable by his heirs after his death, or by his guardian during

<sup>1</sup> 5 Bythewood's Precedents, 4th ed. 89, citing *Blackburn v. Smith*, 2 Exch. 783.

<sup>2</sup> *Wilson v. Kearse*, 2 Peake N. P. C. 196; *Ex parte Taylor*, 8 De G., M. & G. 254.

<sup>3</sup> *Boyden v. Boyden*, 9 Met. 519; *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89, 19 Am. Dec. 194; *Boody v. McKenny*, 23 Me. 517; *Hastings v. Dollarhide*, 24 Cal. 195, 216, per Shafter, J.; *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429; *Robbins v. Eaton*, 10 N. H. 561; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654; *Dewey v. Burbank*, 77 N. C. 259; *Baker v. Kennett*, 54 Mo. 82; *Cheshire v. Barrett*, 4 M'Cord, 241, 17 Am. Dec. 735; *Callis v. Day*, 38 Wis. 643; *Kline v. Beebe*, 6 Conn. 494; *Middleton v. Hoge*, 5 Bush, 478; *Hook v. Donaldson*, 9 Lea, 56; *Ellis v. Alford*, 64 Miss. 8, 1 So. Rep. 155; *Johnston v. Furnier*, 69 Pa. St. 449.

<sup>4</sup> § 27.

<sup>5</sup> *Boody v. McKenny*, 23 Me. 517, per Shepley, J.

<sup>6</sup> *Ellis v. Alford*, 64 Miss. 8, 1 So. Rep. 155.

<sup>7</sup> *Campbell v. Kuhn*, 45 Mich. 513, 8 N. W. Rep. 523, 40 Am. Rep. 479; *Concord Bank v. Bellis*, 10 Cush. 276, per Shaw, C. J.

his lifetime. He may also confirm his purchase after he has been restored to his right mental condition, and then neither he nor his heirs would afterwards be able to avoid it.<sup>1</sup>

160. At common law a married woman could take a conveyance as grantee without her husband's consent, though the husband might avoid it by some act declaring his dissent, and the wife, after her husband's death, could avoid it.<sup>2</sup> But under the modern statutes, which in general confer upon a married woman the same rights in regard to her property that she would have were she not married, save only that in making conveyances of her property her husband must join in them, her husband's assent to her purchase of land is not requisite to make the conveyance indefeasible either by her husband or by herself.

161. Persons holding property in a fiduciary character are not competent to purchase it, either directly or indirectly. This rule is of wide application. It applies not only to persons who are strictly trustees, but also to agents, confidential advisers, partners, directors and promoters of corporations, mortgagees with a power of sale, and all persons "who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property."<sup>3</sup>

The *cestui que trust* can insist upon a reconveyance from the purchasing trustee, or from a third person who purchased with knowledge of the trustee's sale for his own benefit. If the *cestui que trust* has received the proceeds of such sale, he must, in the first place, return the money so received with interest.<sup>4</sup> If the purchasing trustee has made permanent improvements, where there has been no actual fraud he will be allowed for such expenditures as have been of substantial benefit to the property. If

<sup>1</sup> Steed v. Calley, 1 Keen, 620; Beverley's Case, 4 Coke, 123 b.

<sup>2</sup> 2 Kent Com. 150; Nicholl v. Jones, L. R. 3 Eq. 696; Field v. Moore, 19 Beav. 176; Emery v. Wase, 5 Ves. 848; Granby v. Allen, 1 Ld. Raym. 224; Scanlan v. Wright, 13 Pick. 523, 530, 25 Am. Dec. 344; Baxter v. Smith, 6 Binn. 427.

<sup>3</sup> Sugden Vend. & Pur. 688; 1 Perry on Trusts, § 195; 5 Bythewood's Precedents, 4th ed. 95; *Ex parte James*, 8 Ves. 337; *Tate v. Williamson*, L. R. 2 Ch.

55. In this case Lord Chelmsford said: "Wherever two persons stand in such a

relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

<sup>4</sup> *Ex parte James*, 8 Ves. 337, 351; *Morse v. Hill*, 136 Mass. 60, 64.

the *cestui que trust* does not wish for a reconveyance, the property can be put up for sale, either absolutely or at a minimum price. If the purchasing trustee has sold the property, he can be held to account as trustee for the price received. If the property remains unsold in his hands, the *cestui que trust*, if he so elect, can compel him to account for its actual value at the time of the purchase.<sup>1</sup>

162. The trustee may purchase from his *cestui que trust*, or with his full knowledge and consent. "He may, if he pleases," says Lord Eldon,<sup>2</sup> "retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser; and so he may purchase, not indeed from himself as trustee, but under a specific contract with his *cestui que trust*. But, while he continues to be a trustee, he cannot, without the express authority of his *cestui que trust*, have anything to do with the trust property as a purchaser."

The prohibition is, that the trustee shall not buy from himself, using for his own advantage the information about the property acquired by him in his trust capacity.<sup>3</sup> It is essential, however, to the validity of a purchase by a trustee from his *cestui que trust*, that there should be "no fraud, no concealment, no advantage taken by the trustee of the information acquired by him in the character of a trustee."<sup>4</sup> The burden of proof lies on the trustee to establish the propriety of the transaction, and to show that he has acted fairly and openly in dealing with his *cestui que trust*.<sup>5</sup>

A purchase by a trustee may be confirmed by the person beneficially interested under the trust, either expressly or by implication, provided the confirmation was made with full knowledge of the facts of the case, and especially with knowledge that the trustee had purchased and that his purchase was improper.<sup>6</sup> A purchase by a trustee can be set aside only at the option or for the benefit of the *cestui que trust*. The trustee himself cannot repudiate his own purchase.<sup>7</sup>

<sup>1</sup> 1 Perry on Trusts, § 197; *Ex parte Hughes*, 6 Ves. 617; *Morse v. Hill*, 136 Mass. 60, 64, per Field, J.

<sup>2</sup> *Downes v. Grazebrook*, 3 Mer. 200, 208.

<sup>3</sup> 1 Perry on Trusts, § 195; *Coles v. Trecothick*, 9 Ves. 234; *Ex parte Lacey*, 6 Ves. 625; *Clark v. Swaile*, 2 Eden, 134.

<sup>4</sup> Lord Eldon in *Coles v. Trecothick*, 9 Ves. 234, 246; *Randall v. Errington*, 10 Ves. 423; *Denton v. Donner*, 23 Beav. 285; *Tate v. Williamson*, L. R. 2 Ch. 55.

<sup>5</sup> *Luff v. Lord*, 34 Beav. 220; *Whelpdale v. Cookson*, 1 Ves. Sen. 9.

<sup>6</sup> *Charter v. Trevelyan*, 11 Cl. & F. 714; *Barwell v. Barwell*, 34 Beav. 371.

<sup>7</sup> Perry on Trusts, § 198.

## CHAPTER XI.

### CAPACITY OF ALIENS AS PURCHASERS.

163. At common law, aliens could not acquire and hold land by a secure title. The crown or the state could claim land held by them or for their benefit.<sup>1</sup> Coke says: "If an alien, Christian or infidel, purchase houses, lands, tenements, or hereditaments to him and his heirs, albeit he can have no heirs, yet he is of capacity to take a fee simple, but not to hold. For upon an office found, the king shall have it by his prerogative of whomsoever the land is holden. And so it is, if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king. If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them."<sup>2</sup>

In England exceptions to this rule were made by statute, until in 1870 it was provided that all property may be acquired, held, and disposed of by aliens in the same manner as by natural-born British subjects.<sup>3</sup> In this country the disability of alienage is now in many States wholly removed, so that aliens, whether residents or not, may take and hold real property by purchase or otherwise, and dispose of the same, in like manner as can citizens of the United States. In other States the disability is limited or restricted.<sup>4</sup>

<sup>1</sup> *Barrow v. Wadkin*, 24 Beav. 1; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343; *Dumoncel v. Dumoncel*, 13 Ir. Eq. 92; *Norris v. Hoyt*, 18 Cal. 217; *Farrell v. Enright*, 12 Cal. 450.

<sup>2</sup> 1 Co. Litt. 2b.

<sup>3</sup> 33 Vict. ch. 14.

<sup>4</sup> The constitutional or statutory provisions of those States in which the disability is wholly removed are merely referred to, and the restrictions in other States are briefly and partially stated. *Alabama*: Code 1886, § 1914. *Arizona*

*Territory*: Act of Congress, March 3, 1887, applies. Aliens may inherit in special cases. R. S. 1887, § 1472. *Arkansas*: Dig. of Stats. 1884, § 233. *California*: Civ. Code, § 671; *Estate of Billings*, 65 Cal. 593, 4 Pac. Rep. 639. *Colorado*: If *bona fide* residents. Const. 1876, art. 2, § 27. See *McConville v. Howell*, 17 Fed. Rep. 104. *Connecticut*: If residents of any of the United States, or citizens of France, so long as France shall accord the same privilege to citizens of the United States. Non-resident aliens may acquire and hold



By act of Congress it is provided that it shall be unlawful for any person or persons not citizens of the United States, or who

land for mining or quarrying purposes only. G. S. 1888, §§ 15-17. **Delaware**: If resident, and have made declaration of intention to become citizens of the United States. R. Code 1893, ch. 81, § 1, p. 617. All conveyances to aliens before Feb. 1, 1893, validated. Laws 1893, vol. 19, ch. 769. **Florida**: R. S. 1892, § 1816. **Georgia**: Code 1882, § 1661. **Idaho**: R. S. 1887, § 2827. By Laws of 1891, p. 108, aliens are prohibited from acquiring or holding real estate other than mineral lands. **Illinois**: If residents of the United States, and have declared their intention to become citizens. Heirs of aliens may take by inheritance, provided they become residents within a limited time. Corporations organized under the laws of any foreign country cannot acquire or hold real property. R. S. 1889, ch. 6; Laws 1891, p. 3. Prior to July 1, 1887, aliens had the same rights as citizens to hold property. **Indiana**: Provided they are *bona fide* residents of the United States. Acts 1885, p. 79; R. S. 1894, § 3328; *Murray v. Kelly*, 27 Ind. 42. An Indian who is a *bona fide* resident of the United States, though not a citizen, may convey real estate. *Parent v. Walmsly*, 20 Ind. 82; *Steeple v. Downing*, 60 Ind. 478. **Indian Territory**: Act of Congress March 3, 1887, applies. **Kansas**: The Constitution provides that the rights of aliens in reference to the purchase of property may be regulated by law. Adopted 1888. The Laws of 1891, ch. iii., provide that non-resident aliens shall not acquire or hold lands by purchase or otherwise, except that the heirs of aliens may hold for a limited period. No corporation, more than twenty per centum of the stock of which is owned by persons not citizens of the United States, shall hold any real estate. See *Buffington v. Grosvenor*, 46 Kans. 730, 27 Pac. Rep. 137. **Kentucky**: Comp. Stats. 1894, §§ 334-339. By the common law, aliens cannot inherit. This law is in force in Kentucky, though modified by statute. *White v. White*, 2 Met. 185; *Eustache v. Rodaquest*, 11 Bush, 42. **Louisiana**: Aliens have the same rights as citizens to hold and transmit property. **Maine**: R. S. 1883, ch. 73, § 2. **Maryland**: If not enemies. Pub. G. L. 1888, art. 3, p. 9. **Massachusetts**: P. S. 1882, ch. 126. **Michigan**: 2 Annot. Stat. 1882, § 5775. **Minnesota**: Persons not citizens, and who have not declared their intention to become such, and corporations not created under the laws of the United States or any State thereof, cannot hold real estate, except actual settlers upon farms of not more than one hundred and sixty acres, or not exceeding six lots of fifty feet frontage by three hundred feet in depth each. G. S. 1878, ch. 75, § 41; Laws 1887, p. 323; Laws 1889, p. 210. **Mississippi**: If resident. Code 1892, § 2439. **Missouri**: 1 R. S. 1889, § 183. An alien may take by descent from an alien. *Burke v. Adams*, 80 Mo. 504. **Montana**: If resident, may take by descent or succession, as citizens. Prob. Prac. Act, § 553. **Nebraska**: If resident. Const. 1875, art. 1, § 25; Laws 1889, p. 483. Non-resident aliens, and corporations not organized under the laws of the State, are prohibited from acquiring title to lands by descent, devise, purchase, or otherwise. There are exceptions in favor of the widow and heirs of aliens. Consol. Stats. 1891, §§ 4396-4399. **Nevada**: G. S. 1885, § 2655. See Const. art. 1, § 16; *State v. Preble*, 18 Nev. 251, 2 Pac. Rep. 754. **New Hampshire**: If resident. P. S. 1891, ch. 137, §§ 16, 17. **New Jersey**: R. S. 1877, p. 6. **New York**: If they depose that they are resident of, and always intend to reside in, the United States, and to become citizens thereof. 4 R. S. 1889, pp. 2420, 2425. Non-resident aliens may inherit from citizens. Laws 1893, ch. 207. Heirs and devisees of aliens may inherit; but the title of an alien male heir of full age is defeasible by the State unless he makes and files the deposition required as

have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance, or in good faith in the ordinary course of justice in the collection of debts heretofore created. This prohibition does not apply to cases in which the right to hold or dispose of lands is secured by existing treaties to the citizens of foreign countries. No corporation or association, more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associa-

above. 4 R. S. p. 2426; *Kilfoy v. Powers*, 3 Demarest, 198. As to rights of alien heirs, see *Eittenheimer v. Heffernan*, 66 Barb. 374; *Maynard v. Maynard*, 36 Hun, 227; *Kull v. Kull*, 37 Hun, 476. **North Carolina**: Code 1883, ch. 2. **North Dakota**: Civ. Code Dakota, § 2686 of Comp. Laws 1887. **Ohio**: R. S. 1890, § 4173. **Oklahoma Territory**: Act of Congress March 3, 1887, applies. **Oregon**: 2 Annot. Laws 1892, § 2988. **Pennsylvania**: If not enemies, and are resident of the State and have declared their intention to become citizens, aliens may purchase lands not exceeding in quantity five thousand acres, nor in net annual income twenty thousand dollars. 1 Brightly's Purdon's Dig. 1894, p. 91. **Rhode Island**: P. S. 1882, ch. 172, § 6. **South Carolina**: G. S. 1882, § 1768. **South Dakota**: Laws 1890, ch. 123. **Tennessee**: Act of Feb. 11, 1875; Code 1884, § 2804; *Baker v. Shy*, 9 Heisk. 85; *Emmett v. Emmett*, 14 Lea, 369. **Texas**: Aliens who are inhabitants of the State may acquire and hold lands during residence, with right to alienate the same within ten years after ceasing to be an inhabitant. This restriction does not apply to persons holding land in any incorporated or platted city, town, or village. Act of April 12, 1892; Laws 1892, pp. 6, 7. **Utah**: Act of Congress of March 3, 1887, applies. **Vermont**: There is no constitutional or statu-

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tory provision on the subject, and none for declaring a forfeiture for alienage. In *State v. Boston, &c.* R. Co. 25 Vt. 433, the court say that such forfeiture is a possible right of sovereignty, but one that has always remained dormant. **Virginia**: Code 1873, § 43. **Washington**: If they have declared their intention to become citizens of the United States. This restriction does not apply to lands containing mines or minerals. A corporation, a majority of whose stock is held by aliens, is considered an alien within this provision. Const. art. 11, § 33; 1 G. S. 1891, § 2955. **West Virginia**: Not enemies. Const. art. 11, § 5; Acts 1882, ch. 56; Code 1891, p. 632. **Wisconsin**: Non-resident aliens cannot acquire by purchase more than three hundred and twenty acres. This restriction applies to corporations of which more than twenty per cent. of the stock is owned by non-residents of the United States. 1 Annot. Stats. 1889, § 2200 a. **Wyoming**: No distinction between resident aliens and citizens as to the possession and descent of property. Const. 1889, art. 1, § 29.

In **England** the disabilities of alienage were removed by statute May 12, 1870, 34 Vict. ch. 14, § 2, which provides that real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject.

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tions, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the Territories of the United States or of the District of Columbia.<sup>1</sup>

164. A constitutional provision that aliens shall have certain rights in regard to property does not inhibit legislation conferring greater rights. Thus a constitutional provision, giving *bona fide* resident aliens the same rights as to the possession and inheritance of property as native-born citizens have, is a limitation of the legislative power, so that these rights could not be denied by the legislature; but it does not prevent the legislature from conferring additional rights and privileges upon aliens.<sup>2</sup>

A legislative grant of land by the United States or by a State to an alien would doubtless confer the power to enjoy and transmit it, but this rule does not hold good as to patents issued by ministerial officers upon ordinary purchases by an alien of the public domain.<sup>3</sup>

165. As affected by treaties. — The title to real property is acquired, held, and passed according to the *lex rei sitæ*. This principle is applicable not only as between countries entirely foreign to each other, but also to the States of the American Union. It follows that the title of aliens to land within the limits of the several States is a matter of state regulation.<sup>4</sup> Under the Constitution of the United States, treaties made under its authority are the supreme law of the land, and the treaty-making power properly extends to provisions in regard to the transfer, devise, or inheritance of property. Hence a treaty will control or suspend the statute of any State which contravenes the treaty; and a treaty which confers upon citizens of a foreign country the right to take, hold, and transfer real property will suspend or control the laws of a State disqualifying or restricting the right of aliens in this respect.<sup>5</sup>

<sup>1</sup> Act March 3, 1887, 24 Stats. at Large, pp. 476, 477.

There is legislation in a few States, also, that corporations, whose stock or a considerable part of it is held by aliens, shall not acquire and hold real estate. Aside from such legislation, the fact that such stock is held by aliens does not invalidate the title of corporations to land acquired; and such title could be questioned only by the

State where the land is situated. *Princeton M. Co. v. First Nat. Bank*, 7 Mont. 530, 19 Pac. Rep. 210.

<sup>2</sup> *People v. Rogers*, 13 Cal. 159; *Estate of Billings*, 65 Cal. 593, 4 Pac. Rep. 639.

<sup>3</sup> *Etheridge v. Doe*, 18 Ala. 565.

<sup>4</sup> *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. Rep. 195, per Magruder, J.; *United States v. Fox*, 94 U. S. 315; *Etheridge v. Doe*, 18 Ala. 565.

<sup>5</sup> *Geofroy v. Riggs*, 133 U. S. 258, 10

A state statute restricting the right of aliens to acquire and hold real estate is not invalidated by treaties between the United States and foreign countries, except in regard to citizens of countries who are by treaty given the right of holding lands in the United States. A treaty which will suspend or override the statute of a State must be a treaty between the United States and the government of the particular country of which the alien is a citizen or subject.<sup>1</sup>

Where a treaty invests aliens with an interest in land, provided it is asserted within a limited time, or allows an alien heir to take by inheritance and hold for a limited time, such alien has an inviolable right during such time, but after its expiration the state law comes into force and controls the disposition to be made of such land.<sup>2</sup>

166. The common law made a distinction between the disability of an alien to take by purchase and his disability to take by inheritance; for, while an alien could acquire a defeasible title to land by devise or deed, he could take no title whatever by mere operation of law, as by descent, by right of curtesy, or by right of dower.<sup>3</sup>

The title which an alien acquired by purchase or devise he could hold until office found, and he could, until such proceedings were taken, convey the land and confer title upon a purchaser.<sup>4</sup> If the alien dies without having made a conveyance, the land vests

Sup. Ct. Rep. 295; *Hauenstein v. Lynham*, 100 U. S. 483; *Ware v. Hylton*, 3 Dall. 199; *Chirac v. Chirac*, 2 Wheat. 259; *Orr v. Hodgson*, 4 Wheat. 453; *Hughes v. Edwards*, 9 Wheat. 489; *Kull v. Kull*, 37 Hun, 476; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. Rep. 195; *Jost v. Jost*, 1 Mackey, 487.

<sup>1</sup> *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. Rep. 195.

<sup>2</sup> *Schultze v. Schultze*, 144 Ill. 290, 33 N. E. Rep. 201, 36 Am. St. Rep. 432; *Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530 and note.

<sup>3</sup> *Fairfax v. Hunter*, 7 Cranch, 603; *Slater v. Nason*, 15 Pick. 345; *Sheaffe v. O'Neil*, 1 Mass. 256; *Foss v. Crisp*, 20 Pick. 121; *Harley v. State*, 40 Ala. 689; *Sniff v. Forgey*, 1 Cow. 89; *Jackson v. Green*, 7 Wend. 333; *Emmett v. Emmett*,

14 Lea, 369, 371; *Smith v. Zaner*, 4 Ala. 99; *Montgomery v. Dorion*, 7 N. H. 475; *People v. Conklin*, 2 Hill, 67; *Wadsworth v. Wadsworth*, 12 N. Y. 376; *State v. Boston, &c. R. Co.* 25 Vt. 433; *McClenaghan v. McClenaghan*, 1 Strob. Eq. 295, 47 Am. Dec. 532; *Laurens v. Jenney*, 1 Speer, 356; *Norris v. Hoyt*, 18 Cal. 217; *Elmendorff v. Carmichael*, 3 Litt. 472, 14 Am. Dec. 86; *Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530.

<sup>4</sup> *Sheaffe v. O'Neil*, 1 Mass. 256; *Montgomery v. Dorion*, 7 N. H. 475; *Halstead v. Lake Co.* 56 Ind. 363; *Marshall v. Conrad*, 5 Call, 364; *Foxwell v. Craddock*, 1 Pat. & H. 250.

But an alien can convey only a defeasible title. *Purcell v. Smidt*, 21 Iowa, 540; *Harley v. State*, 40 Ala. 689.

immediately by escheat in the State without any inquest of office.<sup>1</sup>

167. Statutes restricting or denying the right of aliens to hold real property can be enforced only by a direct proceeding by the attorney-general to enforce a forfeiture. An alien's right to hold land cannot be questioned by an individual in any collateral action. It is a matter between the State or supreme authority and the alien.<sup>2</sup> Until office found, or an official ascertainment of alienage and a judgment of forfeiture, an alien may

<sup>1</sup> *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 348; *Montgomery v. Dorion*, 7 N. H. 475; *Mooers v. White*, 6 Johns. Ch. 360, 366, Kent, Chancellor, saying: "No one can take by inheritance when he must deduce his title through an alien who has no inheritable blood; and upon the death of the alien the land instantly and of necessity, without any inquest of office, escheats to the people." *Wilbur v. Tobey*, 16 Pick. 177, 180, Shaw, C. J., saying: "An alien cannot take by act of law, as descent, because the law will be deemed to do nothing in vain, and therefore it will not cast the descent upon one who cannot by law hold the estate. Upon the decease of an alien, therefore, as he has no inheritable blood, he can have no legal heirs, and no one can hold or take the estate by descent; the law will not deem it to be in abeyance, unless in case of absolute necessity, and, therefore, the fee is deemed to vest in the commonwealth presently. The commonwealth, therefore, upon the fact of the seisin, alienage, and death of the intestate being shown, have a complete title, without inquest of office."

In *State v. Boston, C. & M. R. Co.* 25 Vt. 433, 438, Redfield, C. J., said: "The escheat of estates to the sovereign, in consequence of a conveyance to an alien, is a result of purely feudal character. It was so held because an alien, owing a foreign allegiance, was regarded as incapable of performing the feudal military services to the king as lord paramount of all the land in the realm. Hence, the convey-

ance having carried the title out of the former proprietor, and the grantee being incapable of taking the estate, it was held to vest in the king absolutely at the death of the first grantee, as an alien could have no heirs to be invested with his bare possession, which was all the estate which ever existed in him, and which was always liable to be divested at any moment upon office found, as it was termed."

<sup>2</sup> *Phillips v. Moore*, 100 U. S. 208; *Osterman v. Baldwin*, 6 Wall. 116; *Cross v. DeValle*, 1 Wall. 1, 1 Cliff. 282; *Gouverneur v. Robertson*, 11 Wheat. 332; *Hammekin v. Clayton*, 2 Woods, 336; *Johnson v. Elkins*, 1 D. C. App. 430; *Ferguson v. Neville*, 61 Cal. 356; *Merle v. Mathews*, 26 Cal. 455; *Raconillat v. Sansevain*, 32 Cal. 376; *Ramires v. Kent*, 2 Cal. 558; *Norris v. Hoyt*, 18 Cal. 217; *Mooers v. White*, 6 Johns. Ch. 360; *Munro v. Merchant*, 28 N. Y. 9; *Stamm v. Bostwick*, 40 Hun, 35, 38; *Jackson v. Adams*, 7 Wend. 367; *Maynard v. Maynard*, 36 Hun, 227; *Marx v. McGlynn*, 88 N. Y. 357; *Hall v. Hall*, 81 N. Y. 130; *Elmendorff v. Carmichael*, 3 Litt. 472, 14 Am. Dec. 86; *Carlow v. Aultman*, 28 Neb. 672, 44 N. W. Rep. 873; *Baker v. Westcott*, 73 Tex. 129, 11 S. W. Rep. 157; *Gray v. Kauffman*, 82 Tex. 65, 17 S. W. Rep. 513; *Sands v. Lynham*, 27 Gratt. 295, 21 Am. Rep. 348; *American Mortg. Co. v. Tennille*, 87 Ga. 28, 13 S. E. Rep. 158, 12 Lawyer's Rep. 529; *Waugh v. Riley*, 8 Met. 290; *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344; *Halstead v. Lake Co.* 56 Ind. 363.

hold real estate against every one, and even against the state or government.<sup>1</sup> If he becomes a citizen, or otherwise becomes qualified to hold land, before a forfeiture is declared in favor of the state or government, his title becomes perfect even as against the state or government.<sup>2</sup>

Until office found, an alien may maintain ejectment or other action for the recovery of land acquired by purchase;<sup>3</sup> or may maintain a suit in partition to have his interest set aside in severalty.<sup>4</sup>

An alien may acquire title by possession, which, if continued long enough without the interposition of the state, will establish an indefeasible title.<sup>5</sup>

**168. Where a woman who is an alien intermarries with a citizen, by virtue of the marriage she becomes a citizen, and capable of taking and holding lands, under a statute limiting the right to acquire and hold land to citizens.<sup>6</sup>**

<sup>1</sup> *People v. Folsom*, 5 Cal. 373; *Norris v. Hoyt*, 18 Cal. 217; *Merle v. Matthews*, 26 Cal. 455; *Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. Rep. 741; *Williams v. Bennett*, 1 Tex. Civ. App. 498, 20 S. W. Rep. 856; *Baker v. Westcott*, 73 Tex. 129, 134, 11 S. W. Rep. 157.

<sup>2</sup> *Osterman v. Baldwin*, 6 Wall. 116; *Foss v. Crisp*, 20 Pick. 121; *Harley v. State*, 40 Ala. 689; *Jackson v. Green*, 7 Wend. 333; *People v. Conklin*, 2 Hill, 67; *Baker v. Westcott*, 73 Tex. 129, 11 S. W. Rep. 157. But this rule does not apply to the heirs of aliens, for upon the death of their ancestor the estate vests at

once in the state. *Heeney v. Brooklyn Benev. Soc.* 33 Barb. 360; *Vaux v. Nesbit*, 1 McCord Ch. 352, 372.

<sup>3</sup> *Airhart v. Massieu*, 98 U. S. 491; *Norris v. Hoyt*, 18 Cal. 217; *Bradstreet v. Oneida*, 13 Wend. 546; *Sheaffe v. O'Neil*, 1 Mass. 256; *Courtney v. Turner*, 12 Nev. 345. *Contra*, *Laurens v. Jenney*, 1 Speer, 356.

<sup>4</sup> *Schultze v. Schultze*, 144 Ill. 290, 33 N. E. Rep. 201, 36 Am. St. Rep. 432.

<sup>5</sup> *Piper v. Richardson*, 9 Met. 155.

<sup>6</sup> *Luhrs v. Eimer*, 80 N. Y. 171; *Headman v. Rose*, 63 Ga. 458.

## CHAPTER XII.

### CAPACITY OF CORPORATIONS AS PURCHASERS.

I. Restrictions upon domestic corporations, 169-181. | II. Restrictions upon foreign corporations, 182-192.

#### *I. Restrictions upon Domestic Corporations.*

169. At common law, the power to acquire and hold real estate for the purposes for which they are organized, without restriction or limitation, is an incident of all civil corporations.<sup>1</sup> "As to a corporate capacity to make contracts, the common law never discriminated between a contract for land and a contract for any other thing. And no doctrine of the common law is more clearly and undeniably established than that which concedes to corporations an inherent or resulting right to acquire and hold titles to land by contract, except so far only as they may be restricted by the objects of their creation, or the limitations of their charters."<sup>2</sup>

If it is shown that a corporation is duly organized under legislative authority, there is a presumption, in the absence of any showing to the contrary, that it has the common-law right to purchase and hold land, and that it is exercising a proper and legitimate authority in acquiring it.<sup>3</sup>

<sup>1</sup> *Blanchard's, &c. Factory v. Warner*, 1 Blatchf. 258, 277, per Nelson, J.; *Old Colony R. Co. v. Evans*, 6 Gray, 25, 38; *Boston v. Sears*, 22 Pick. 122; *First Parish v. Cole*, 3 Pick. 232, 239, per Parker, C. J.; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536, 541; *Thompson v. Waters*, 25 Mich. 214, 227, per Christianity, C. J.; *Auerbach v. Le Sueur Mill Co.* 28 Minn. 291, 41 Am. Rep. 285; *Callaway M. & M. Co. v. Clark*, 32 Mo. 305; *Sherwood v. American Bible Soc.* 4 Abb. App. Dec. 227; *Moss v. Averill*, 10 N. Y. 449, 461; *Spear v. Crawford*, 14 Wend. 20, 25; *M'Cartee v. Orphan Asylum Soc.* 9 Cow. 437, 462; *First Baptist Church v. Brooklyn F. Ins. Co.* 19 N. Y. 305; *Reynolds v. Stark Co.* 5 Ohio, 204, 205; *Overmyer v. Williams*, 15 Ohio, 26, 31; *State v. Madison*, 7 Wis. 688; *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706; *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378.

<sup>2</sup> *Lathrop v. Commercial Bank*, 8 Dana, 114, 119, per Robertson, C. J.

<sup>3</sup> *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 290, 22 S. W. Rep. 623; *Stockton Sav. Bank v. Staples*, 98 Cal.

170. In England, statutes of mortmain formerly restrained or prohibited corporations from holding land without the license of the king. They began with Magna Charta, in the time of Henry III., and continued down to the time of George II. These statutes applied equally to ecclesiastical and to lay corporations. "These statutes," says Chancellor Kent,<sup>1</sup> "are known by the name of the statutes of mortmain, and they applied only to real property; and were introduced during the establishment and grandeur of the Roman Church to check the ecclesiastics from absorbing in perpetuity, in hands that never die, all the lands of the kingdom, and thereby withdrawing them from public and feudal charges."

Statutes of mortmain have not been enacted in this country, and the British statutes were never assumed to be in force in any colony or State with the exception of Pennsylvania;<sup>2</sup> and they were considered to be operative there only because the charter of Penn was understood to adopt them. The policy of these statutes was for a time partially adopted in some of the colonies.<sup>3</sup>

189, 32 Pac. Rep. 936; *People v. La Rue*, 67 Cal. 526, 8 Pac. Rep. 84; *Hagar v. Board*, 47 Cal. 222; *Tarpey v. Deseret Salt Co.* 5 Utah, 494, 17 Pac. Rep. 631.

<sup>1</sup> 2 Kent Com. 282. Shelford, in his treatise on The Law of Mortmain, p. 2, says: "Alienation in mortmain, in *mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain. 2 Bl. Com. 268. Lord Coke, after mentioning the conjectures of others upon the origin of the term, says that the true cause and meaning thereof was taken from the effects, as it is expressed in the statute itself (7 Edw. I. stat. 2, ch. 1); that the services that were due out of such fees, and which in the beginning were created for the defence of

the realm, were unduly withdrawn, and the chief lords did lose their escheats, wardships, reliefs, and the like, so as the lands were said to come to dead hands as to the lords, for that a dead hand yieldeth no service. Co. Litt. 2 b. Mr. Justice Blackstone observes, 1 Bl. Com. 475, that, of the conjectures offered by Sir Edward Coke, the one that seems most probable is, that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law; land, therefore, holden by them, might with great propriety, be said to be held in *mortua manu*."

<sup>2</sup> 2 Kent Com. 282; *Lathrop v. Commercial Bank*, 8 Dana, 114, 125, 33 Am. Dec. 481; *Potter v. Thornton*, 7 R. I. 252; *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378; *Chambers v. St. Louis*, 29 Mo. 543, 575; *First Parish v. Cole*, 3 Pick. 232, 239, per Parker, C. J.; *White v. Howard*, 38 Conn. 342, 361; *Methodist Church v. Remington*, 1 Watts, 218, 26 Am. Dec. 61; *Miller v. Porter*, 53 Pa. St. 292.

<sup>3</sup> In the Province of Massachusetts



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171. In the nature of mortmain acts are some of the restrictions adopted in different States in regard to the capacity of various corporations to acquire and hold property. Such was the former statute of wills of the State of New York, which provided that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The Court of Appeals in relation to this matter said: "It is said we have no mortmain policy or statutes. But this is not so. The exception in the former statute of wills was with us intended to prevent devises of real estate from being made to corporate bodies, where it would be locked up in perpetuity, and also to prevent languishing and dying persons from being imposed upon by false notions of duty prompting them to disregard the claims of family and kindred. The positive statute we now have is still more distinctly founded in that policy, and it was enacted to solve the doubts which great learning and ingenuity had suggested. It is a statute of mortmain, resting on a mortmain policy, as distinctly as any act of the British Parliament. The condition of society and the freedom of religious opinion in this country have rendered the necessity of still greater restrictions on the power of acquiring real estate by corporations less apparent than formerly in England. But the necessity is recognized of forbidding the acquisition by will, unless the legislature, in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms. The legislative grant of the power is the equivalent to the license from the crown, which, according to an act of Parliament, might dispense with the mortmain statutes in Great Britain."<sup>1</sup>

Bay a mortmain act was passed (Prov. St. of 29 Geo. II. ch. 9), but it was repealed directly after the Revolution. St. 1785, ch. 51; *Odell v. Odell*, 10 Allen, 1, 6. It has been doubted whether the English statute of mortmain had any application at all to the British colonies. *Attorney-General v. Stewart*, 2 Mer. 143; *Whicker v. Hume*, 1 De G., M. & G. 506, affirmed 7 H. L. Cas. 124. The statute was never in force in Wisconsin. *Dodge v. Williams*, 46 Wis. 70, 50 N. W. Rep. 1103, Ryan, C. J., saying: "When this State was

part of a vast wilderness, and all property, real and personal, was in the Indian tribes or in the British crown, the statute of mortmain was not merely inapplicable, but had no possible office to fulfil. If the English statute of mortmain was not in force in Wisconsin while it was part of or appendant to an English colony, it seems very certain that it has never since had any force here."

<sup>1</sup> *Downing v. Marshall*, 23 N. Y. 366, 386, 80 Am. Dec. 290, per Comstock, C. J.

172. By general statute in almost every State, the right of corporations to acquire and hold real estate is expressly conferred. This right is generally limited, either by implication or in express terms. Corporations organized for religious, charitable, or educational purposes are generally much restricted in their capacity to acquire and hold real estate. Private business corporations in nearly every State may acquire, hold, and convey so much real estate as may be necessary or proper for the transaction of their business.<sup>1</sup> The statutes in the several States are

<sup>1</sup> **Alabama**: Such as may be necessary for their use. Code 1886, § 1664. **Arizona**: Possess the same powers as private individuals as to acquiring and transferring property. R. S. 1887, § 233. **Arkansas**: Necessary for their use. Dig. of Stats. 1884, § 973. **California**: Such as the purposes of corporation may require. Civ. Code, § 354. **Colorado**: Necessary for transaction of their business. Annot. Stats. 1891, § 476. **Connecticut**: Necessary and convenient. P. S. 1887, §§ 1906, 1952. **Delaware**: May hold for the purposes of their incorporation. R. Code 1874, ch. 70, § 1. **District of Columbia**: Necessary to carry on its business. R. S. 1873, § 554. **Florida**: Such as purposes of corporation require. R. S. 1892, § 2121. **Georgia**: Necessary for the purpose of their organization. Code 1882, § 1679. **Idaho**: Such as purposes of corporation require. R. S. 1887, § 2633. **Illinois**: Necessary for their business. But all real estate acquired in satisfaction of any liability or indebtedness, unless the same is necessary or suitable for the business of such corporation, shall be offered at public auction at least once every year and sold, whenever the price offered is not less than the claim upon it; and if it is not sold within five years the State's attorney shall proceed by information against the corporation to obtain a sale of such land. R. S. 1889, ch. 32, § 5. **Iowa**: May acquire with the same power as private individuals. Annot. Code 1888, § 1609. **Kansas**: Such as purposes of corporation require. G. S. 1889, § 1167. **Kentucky**: Shall not hold real estate, except such as may be necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat. G. S. 1894, § 567. **Louisiana**: May hold and convey real property. R. L. 1884, § 684. **Maine**: May hold and convey lands. R. S. 1883, ch. 46, § 2. **Maryland**: Necessary or proper. Pub. G. L. 1888, art. 23, § 53. **Massachusetts**: May hold such real estate as is necessary for the purposes of its organization. P. S. 1882, ch. 106, § 50. **Michigan**: May hold land to an amount authorized by law and convey the same. Annot. Stats. 1882, § 4866. A corporation for acquiring and selling real estate may hold such as may be necessary for carrying on its business, and may mortgage and dispose of the same with pleasure; but such corporation shall not hold at one time more than one thousand acres, and the title shall not remain in the corporation for a term exceeding seven years. Pub. Acts 1891, p. 63. **Minnesota**: Necessary or convenient for the purpose of its business. G. S. 1894, § 2798. **Mississippi**: Real and personal property necessary and proper for its purposes, not exceeding \$250,000, though manufacturing companies and banks may hold property to the amount of \$1,000,000. Annot. Code 1892, § 838. May take a lien on a larger amount of property as security or in payment of a debt, but shall not hold the same longer than five years. § 838. **Missouri**: Shall not hold real estate for any longer period than six years, except such as may be necessary and proper for its legitimate business. Const. art. 12, § 7; R. S. 1889, § 2508. **Montana**:

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not precisely alike in terms, some describing the real estate which corporations may hold as "necessary," others as "proper," or "necessary and convenient," or "required" for the purposes of the incorporation; but there is little if any difference in the meaning of these statutes.

173. A deed to a corporation which is forbidden by its charter to purchase and hold real estate is void.<sup>1</sup> In such case,

May hold and convey such real property as its purposes may require. *Comp. Laws* 1887, §§ 447, 482. **Nebraska**: Necessary for legitimate business. *Comp. Stats.* 1893, ch. 16, § 124. **Nevada**: Such real estate as the purposes of the corporation require. *G. S.* 1885, § 805. **New Hampshire**: Necessary and proper. *P. S.* 1891, ch. 149, § 8. **New Jersey**: Such as purposes of corporation require. *R. S.* 1877, *Corp. Act*, § 1. **New Mexico**: May hold, mortgage, and convey such as purposes of corporation require. *Comp. Laws*, 1884, § 195. **New York**: Such as the purposes of the corporation require. *Laws* 1892, ch. 687, § 11. **North Carolina**: May hold and convey land not exceeding three hundred acres, or for longer than thirty years, except mining, manufacturing, and water supply companies. *Code* 1883, § 666. **North Dakota**: Such as its purposes may require. *Comp. Laws* 1887, § 2919. **Ohio**: Necessary and convenient for the objects of the incorporation. *R. S.* 1892, § 3239. **Oklahoma**: Such as purposes of the corporation may require. *Stats.* 1893, § 949. **Oregon**: Necessary and convenient to carry into effect its objects. *Annot. Laws* 1892, § 3221. **Pennsylvania**: Such as purposes of the corporation require. *Brightly's Purdon's Dig.* 1894, p. 405. **Rhode Island**: May hold and convey real estate. *P. S.* 1882, ch. 152, § 1. **South Carolina**: Such as may be required for their purposes. *Acts* 1886, ch. 288, §§ 22, 26. **South Dakota**: Shall not hold any real estate, except such as may be necessary and proper for its legitimate business. *Const. art.* 17, § 7. **Tennessee**: Necessary for the corporate business. *Code* 1884, § 1704. **Texas**: Such as the pur-

poses of the corporation shall require. *R. Civ. Stats.* 1889, art. 575. **Utah**: Necessary for its general business, but shall not engage in business of buying and selling real estate. *Comp. Laws* 1888, § 2272. **Vermont**: Necessary for the purposes of the corporation. *R. L.* 1880, § 3282. **Virginia**: May hold and grant real estate. *Code* 1887, § 1068. **Washington**: May hold, mortgage, and convey real estate. *G. S.* 1891, § 1500. **West Virginia**: May hold and grant real estate. *Code* 1887, ch. 52, § 1. **Wisconsin**: To hold real property to an amount authorized by law. *Annot. Stats.* 1889, § 1748. **Wyoming**: May hold and convey any real estate necessary for the purposes of the corporation. *R. S.* 1887, § 502. **United States Territories**: No corporation, other than those organized for the construction or operation of railways, canals, or turnpikes, shall acquire, hold, or own more than five thousand acres of land in any of the Territories of the United States; and no railroad, canal, or turnpike corporation shall hereafter acquire, hold, or own lands in any Territory other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by act of Congress. *U. S. Stats.* 1887, ch. 340, § 3.

<sup>1</sup> *St. Peter's, &c. Cong. v. Germain*, 104 Ill. 440; *United States Trust Co. v. Lee*, 73 Ill. 142, 24 Am. Rep. 236; *Starkweather v. Am. Bible Soc.* 72 Ill. 50, 22 Am. Rep. 133; *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699; *Leazure v. Hillegas*, 7 S. & R. 313, 319; *Matthews v. Skinker*, 62 Mo. 329, 21 Am. Rep. 425; *Hayward v. Davidson*, 41 Ind. 212.

the corporation being prohibited to take and hold real estate for any purpose, it would seem to be wholly wanting in the capacity to take title under a deed.<sup>1</sup>

But probably the better view is, that even in such case the deed is not absolutely void, but only voidable at the instance of the State.<sup>2</sup> It is valid until assailed by the sovereign power. Thus, where a New York corporation took a deed to real estate in Pennsylvania, where by statute a foreign corporation is forbidden to acquire and hold real estate, it was held that the deed to the corporation was not void, but conveyed title to it under which it could maintain ejectment, and that the State of Pennsylvania alone could object to the legal capacity of the corporation to hold the land.<sup>3</sup>

**174. A mortgage to a national bank which is prohibited to loan on such security is not void but may be enforced.** A bank organized under the national banking act<sup>4</sup> is authorized to take and hold a mortgage of real estate by way of security for debts previously contracted,<sup>5</sup> but not to take such a mortgage as security for a debt contracted at the time or for future advances. Such a mortgage was till recently regarded as invalid.<sup>6</sup> Therefore a mortgage made to a national bank by a customer, as collateral security for the payment of all notes then discounted and held by the bank, "or for any other indebtedness now due, or that may hereafter become due," was regarded a valid security only for the indebtedness existing when it was given; and upon the payment of such indebtedness, and the surrender of the specific notes constituting such indebtedness, the mortgage was discharged.<sup>7</sup> The Supreme Court has recently, however, established

<sup>1</sup> Angell & Ames on Corp. § 152; Gilbert v. Holc, 2 S. D. 164, 49 N. W. Rep. 1, 4 Am. R. & Corp. Rep. 683, per Kellam, P. J.

<sup>2</sup> National Bank v. Matthews, 98 U. S. 621, 628; Tarpey v. Deseret Salt Co. 5 Utah, 494, 17 Pac. Rep. 631; Missouri Val. Land Co. v. Bushnell, 11 Neb. 192, 8 N. W. Rep. 389; Myers v. McGavock, 39 Neb. 843, 58 N. W. Rep. 522; Russell v. Railway Co. 68 Tex. 646, 5 S. W. Rep. 686.

<sup>3</sup> Hickory Farm Oil Co. v. Buffalo, &c. R. Co. 32 Fed. Rep. 22.

<sup>4</sup> June 3, 1864, §§ 8, 28.

<sup>5</sup> Allen v. First Nat. Bank of Xenia, 23 Ohio St. 97; Heath v. Second Nat. Bank of Lafayette, 70 Ind. 106; Scofield v. State Nat. Bank, 9 Neb. 316, 2 N. W. Rep. 888, 31 Am. Rep. 412.

<sup>6</sup> Kansas Valley Bank v. Rowell, 2 Dill. 371; Crocker v. Whitney, 71 N. Y. 161; Fowler v. Scully, 72 Pa. St. 456, 13 Am. Rep. 699; Ripley v. Harris, 3 Biss. 199; First Nat. Bank v. Maxfield, 83 Me. 576, 22 Atl. Rep. 479.

<sup>7</sup> Crocker v. Whitney, 71 N. Y. 161; Woods v. People's Nat. Bank of Pittsburgh, 83 Pa. St. 57.

a different and more reasonable construction of the prohibition in the national banking act of a loan made upon real estate security, declaring that, although such a loan is prohibited, it is not void. A mortgage taken in violation of the prohibition is valid and may be enforced. The remedy for the violation is a forfeiture of the bank's charter.<sup>1</sup>

175. The question whether a corporation has exceeded its powers in acquiring real estate is generally one between the State and the corporation.<sup>2</sup> The right of a corporation to hold real estate cannot be questioned collaterally, but only by the State in a direct proceeding instituted for the purpose.<sup>3</sup> Thus, in

<sup>1</sup> *Fortier v. New Orleans Bank*, 112 U. S. 439, 5 Sup. Ct. Rep. 234; *National Bank v. Matthews*, 98 U. S. 621, 19 Alb. L. J. 132, 18 West. Jur. 176, 8 Cent. L. J. 131; *National Bank v. Whitney*, 103 U. S. 99; *Swope v. Leffingwell*, 105 U. S. 3; *Kesner v. Trigg*, 98 U. S. 50; *Thornton v. Nat. Exchange Bank*, 71 Mo. 221; *First Nat. Bank v. Elmore*, 52 Iowa, 541, 3 N. W. Rep. 547; *Wroten v. Armat*, 31 Gratt. 228; *First Nat. Bank v. Roberts*, 9 Mont. 323, 331, 23 Pac. Rep. 718.

<sup>2</sup> *Cowell v. Springs Co.* 100 U. S. 55; *National Bank v. Whitney*, 103 U. S. 99; *National Bank v. Matthews*, 98 U. S. 621, 628; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 413, 5 Sup. Ct. Rep. 213; *Runyan v. Coster*, 14 Pet. 122.

*California*: *Natoma Water & M. Co. v. Clarkin*, 14 Cal. 544, 552; *California State Tel. Co. v. Alta Tel. Co.* 22 Cal. 398. *Illinois*: *Hough v. Cook Co. Land Co.* 73 Ill. 23, 24 Am. Rep. 230; *Alexander v. Tolleston Club*, 110 Ill. 65; *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. Rep. 477, 13 Am. & Eng. Corp. Cas. 7. *Indiana*: *Baker v. Neff*, 73 Ind. 68; *Hayward v. Davidson*, 41 Ind. 212. *Iowa*: *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa, 101, 4 N. W. Rep. 842. *Missouri*: *Ragan v. McElroy*, 98 Mo. 349, 352, 11 S. W. Rep. 735; *McIndoe v. St. Louis*, 10 Mo. 576; *Chambers v. St. Louis*, 29 Mo. 543; *Shewalter v. Pirner*, 55 Mo. 218, 233. *Mississippi*: *Wade v. Am. Col. Soc.* 7 S. & M. 663, 697, 45 Am. Dec. 324.

*Nevada*: *Whitman Min. Co. v. Baker*, 3 Nev. 386. *Nebraska*: *Watts v. Gantt* (Neb.), 61 N. W. Rep. 104; *Missouri Val. Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. Rep. 389; *Carlow v. Aultman*, 28 Neb. 672, 44 N. W. Rep. 873; *Myers v. McGavock*, 39 Neb. 843, 58 N. W. Rep. 522; *Hanlon v. Union P. R. Co.* 40 Neb. 52, 58 N. W. Rep. 590. *New Jersey*: *De Camp v. Dobbins*, 29 N. J. Eq. 36, 31 N. J. Eq. 671, 691. *New York*: *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, 758. *North Carolina*: *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 595. *Pennsylvania*: *Grant v. Henry Clay Coal Co.* 80 Pa. St. 208; *Bone v. Delaware & H. Canal Co. (Pa.)* 5 Atl. Rep. 751; *Goundie v. Northampton W. Co.* 7 Pa. St. 233, 239; *Baird v. Bank of Washington*, 11 S. & R. 411; *Leazure v. Hillegas*, 7 S. & R. 313. *Tennessee*: *Barrow v. Nashville & C. T. Co.* 9 Humph. 304. *Virginia*: *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706. *Texas*: *Russell v. Texas & P. Ry. Co.* 68 Tex. 646, 5 S. W. Rep. 686.

<sup>3</sup> *Seymour v. Slide & Spur Gold Mines*, 153 U. S. 523, 14 Sup. Ct. Rep. 847; *Cowell v. Springs Co.* 100 U. S. 55, 60; *Friets v. Palmer*, 132 U. S. 282, 10 Sup. Ct. Rep. 93; *National Bank v. Whitney*, 103 U. S. 99; *Jones v. Habersham*, 107 U. S. 174, 188, 2 Sup. Ct. Rep. 336; *Watts v. Gantt* (Neb.), 61 N. W. Rep. 104; *Davis v. Old Colony R. Co.* 131 Mass. 258, 273, 41 Am. Rep. 221, per Gray, C. J.; *Butte Hardware Co. v. Schwab* (Mont.), 34 Pac. Rep. 24; *Galveston Land & Imp. Co. v. Perkins* (Tex. Civ.

an action by a corporation to recover possession of land, it is no defence for the defendant to answer that a recovery by the corporation would vest in it more land than it was entitled to hold.<sup>1</sup> "It would lead to infinite inconveniences and embarrassments if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity."<sup>2</sup>

The only exception to this rule is where a collateral attack by a private party is expressly authorized by legislative permission.<sup>3</sup>

176. A corporation *de facto* may take a conveyance of land, and its corporate existence and right to hold the land can be questioned only by the State in direct proceedings to inquire into its right to exercise corporate functions.<sup>4</sup> In an action by it to recover possession of land, no private person will be allowed to inquire collaterally into the regularity of its organization. A suit by such a corporation to foreclose a mortgage cannot be defeated by a junior mortgagee by showing that the corporation was defectively organized.<sup>5</sup>

177. But the rule, that the limitation of the power of a corporation to acquire and hold land concerns the State alone, applies only when the land has been acquired: it does not apply when a corporation, as plaintiff, is seeking to acquire land which it is not authorized to acquire. This distinction is made clear in a judgment delivered by Mr. Justice Miller in a case be-

App.), 26 S. W. Rep. 256; Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. Rep. 623; Ragan v. McElroy, 98 Mo. 349, 352, 11 S. W. Rep. 735; Hovelman v. Kansas City, &c. R. Co. 79 Mo. 632; Thornton v. Nat. Exch. Bank, 71 Mo. 221; Atlantic & P. R. Co. v. St. Louis, 66 Mo. 228, 251; Shewalter v. Pirner, 55 Mo. 219, 233; Land v. Coffman, 50 Mo. 243; Chambers v. St. Louis, 29 Mo. 543, 573.

<sup>1</sup> Bone v. Delaware & H Canal Co. (Pa.) 5 Atl. Rep. 751.

<sup>2</sup> Naroma Water & M. Co. v. Clarkin, 14 Cal. 544, 552, per Field, C. J.

<sup>3</sup> Kinealy v. St. Louis &c. Ry. Co. 69 Mo. 658, 663; Marindale v. Kansas City,

&c. R. Co. 60 Mo. 508; Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. Rep. 623.

<sup>4</sup> Doyle v. San Diego Land Co. 46 Fed. Rep. 709; East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. Rep. 260; People v. La Rue, 67 Cal. 526, 8 Pac. Rep. 84; Baker v. Neff, 73 Ind. 68; Thompson v. Candor, 60 Ill. 244; Hudson v. Green Hill Seminary, 113 Ill. 618; Granby M. Co. v. Richards, 95 Mo. 106; Finch v. Ullman, 105 Mo. 255, 263, 16 S. W. Rep. 863; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. Rep. 1077.

<sup>5</sup> Williamson v. Kokomo Build. Asso. 89 Ind. 389.

fore the Supreme Court of the United States:<sup>1</sup> "We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands; and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that, while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law, and enabling the company to do that which the law forbids."

178. Corporations have generally no power to acquire and hold real estate for purposes other than those for which they were organized.<sup>2</sup> They cannot purchase and hold real estate indefinitely, without regard to the uses to be made of it. Thus a railroad corporation authorized to acquire and hold lands for its right of way and for other purposes particularly enumerated connected with the use and management of the railroad, cannot acquire lands for speculative or farming purposes, or for any other purposes than those mentioned. The enumeration of purposes is necessarily exclusive of all other purposes.<sup>3</sup> The corporation is limited to the holding of such lands as are necessary for the location of its road, its stations, and necessary buildings.

<sup>1</sup> *Case v. Kelly*, 133 U. S. 21, 28, 10 Sup. Ct. Rep. 216.

<sup>2</sup> *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. Rep. 216; *Morgan v. Donovan*, 58 Ala. 241; *Occum Co. v. Sprague Manuf. Co.* 34 Conn. 529; *Coleman v. San Raphael Turnp. Co.* 49 Cal. 517; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Waldo v. Chicago, &c. R. Co.* 14 Wis. 575; *First Parish v. Cole*, 3 Pick. 232; *Rensselaer, &c. R. Co. v. Davis*, 43 N. Y. 137; *Bank of Michigan v. Niles, Walker (Mich.)*, 99,

1 Doug. 401, 41 Am. Dec. 575; *Hayward v. Davidson*, 41 Ind. 212; *State Bank v. Brackenridge*, 7 Blackf. 395; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *State v. Mansfield*, 23 N. J. L. 510.

<sup>3</sup> *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. Rep. 216; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Rensselaer, &c. R. Co. v. Davis*, 43 N. Y. 137; *State v. Mansfield*, 23 N. J. L. 510; *Hamilton v. Annapolis, &c. R. Co.* 1 Md. 553; *El-dridge v. Smith*, 34 Vt. 484.

**179.** Whether a limitation by the charter of a corporation as to the amount of property it may hold is operative only in favor of the State, and the corporation can hold property in excess of the limitation as against the rest of the world, is a question upon which there is some apparent conflict of opinion; though the weight of authority is to the effect that such a corporation cannot take beyond the amount limited, and that any person entitled may invoke the limitation unless precluded by estoppel. The doctrine, that a corporation may take property in excess of the amount limited by its charter, has been declared for the most part in cases where the property has been acquired by purchase for value, "and consequently where the vendor was estopped by his own conveyance from contesting the title conveyed, and equally so his heirs; or where the persons challenging the title were mere strangers to it, and as such in no position to question its validity."<sup>1</sup> This doctrine has, however, been declared in some cases in which there was no estoppel, the property having been given by will.<sup>2</sup>

In cases where there is no estoppel, as where the property is given by will to a corporation in excess of its capacity by its charter or by statute to hold property, the doctrine generally declared is that the gift is invalid so far as it exceeds the limit, and to that extent goes over under the will, or descends as intestate property to the heirs or next of kin of the testator.<sup>3</sup> In the well-considered case decided by the Supreme Court of Rhode Island, Chief Justice Durfee said: "It seems to us that the natural and logical conclusion, independently of authority, is, that an artificial body created by law, without capacity to take or hold property beyond a certain limit, cannot, by reason of the very law of its being, take or hold property beyond that limit, and consequently that the courts ought to recognize the fact in favor of any person who is entitled, on supposition of the incapacity of the corporation, unless, by estoppel or otherwise, such person is precluded from making claim."

<sup>1</sup> *Wood v. Hammond*, 16 R. I. 98, 116, 17 Atl. Rep. 324, per Durfee, C. J.

<sup>2</sup> As in *Jones v. Habersham*, 107 U. S. 174, 183, 2 S. Ct. Rep. 336; and *De Camp v. Dobbins*, 29 N. J. Eq. 33, 31 N. J. Eq. 671, 690. In each of these cases the act imposing the limitation had been al-

tered or repealed before the will went into effect.

<sup>3</sup> *Wood v. Hammond*, 16 R. I. 98, 118, 17 Atl. Rep. 324; *Matter of McGraw*, 111 N. Y. 66, 19 N. E. Rep. 233; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Cromie v. Louisville Orphans' Soc.* 3 Bush, 365.



In the leading case in New York it was held that a limitation by charter as to the amount of property a corporation may hold renders any gift to it by will beyond that amount wholly void. Thus the charter of Cornell University, having provided that it might hold property not exceeding three million dollars in the aggregate, was held to be prohibited from holding property beyond that amount; and it appearing that the university already held property up to this limit, a further gift to it by will was declared void, and that the heirs or next of kin of the testator could raise the question.<sup>1</sup>

180. The distinction recognized in relation to the English mortmain acts between the taking and holding of property by corporations is not applicable in respect to the restrictions upon the capacity of corporations in this country. Under the old mortmain laws the title vested in the corporation, and this was indefeasible except by the reëntry of the person entitled to take by reason of the forfeiture. The superior lord or the king might grant a license to the corporation to hold the land; but the superior lord, or ultimately the king, might insist upon a forfeiture. But in case the forfeiture was not insisted upon, the corporation could hold as against all the world. In an important case before the Court of Appeals of New York it was argued, from the vesting of title under the mortmain acts, and the title remaining in the corporation except in case of a reëntry of the person entitled to claim a forfeiture, that under the charter of the Cornell University, granted by the State of New York, limiting the amount of property the corporation might hold, property in excess of the limitation given by will would vest in the corporation, and that the restriction applied only to its holding the property in excess of the amount limited. Replying to this, Mr. Justice Peckham, delivering the opinion of the court, said:<sup>2</sup> "But the circum-

<sup>1</sup> *Matter of McGraw*, 111 N. Y. 66, 19 N. E. Rep. 233.

<sup>2</sup> In *Matter of McGraw*, 111 N. Y. 66, 93, 95, 19 N. E. Rep. 233. See, also, *Bank of Mich. v. Niles*, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; and *Wood v. Hammond*, 16 R. I. 98, 119, 17 Atl. Rep. 324, 18 Atl. Rep. 198. The latter case, in which the same point was considered, fully approves the decision in *Matter of McGraw*.

In *Pennsylvania*, however, the doctrine of *Leazure v. Hillegas*, 7 S. & R. 313, and other cases following that, is that, although corporations may take real estate except for superstitious uses, they cannot hold it, in consequence of the statutes of mortmain; but, as the title has passed to the corporations, it must remain there until the State enforces the forfeiture.

stances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this State. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein limiting the holding of property is, as I have said, a restriction also upon the power to take in excess of the specified amount. As, at common law, a corporation could take real property in the same way as an individual, the consequence was that, in England, large landed possessions were held by religious corporations, and, by reason of alienations of real estate to them, the services due by the vassal to the lord were partially if not totally paralyzed, and the chief lords lost their escheats. This was a constantly growing and alarming evil. To remedy the difficulty, the first act was placed in Magna Charta, which declared all such alienations to corporations entirely void, and that the lands should revert to the lord of the fee. It was held, however, that the reversion must be accomplished by an entry, and then and from that time there was a forfeiture, the corporation having taken the title and held the property until such forfeiture by reëntry. . . . There is, by reference to our laws, no such necessary and universal distinction between taking and holding property by corporations as is seen in the laws of England relating to alienations in mortmain. Whether the legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount."

181. A deed to a corporation authorized for some purposes, or to a limited extent, to hold real estate, is not void though the lands were purchased for other purposes, or beyond the limit allowed. The deed passes the title as between the parties to the deed.<sup>1</sup> Whether the corporation has exceeded its powers in mak-

<sup>1</sup> Dillon on Municipal Corporations, 4th ed. 574; Cowell v. Springs Co. 100 U. S. 55, 60; National Bank v. Matthews, 98 U. S. 621, 628; Natoma W. & M. Co. v. Clarkin, 14 Cal. 544; Barnes v. Suddard, 117 Ill. 237, 7 N. E. Rep. 477; Hamsher v.

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ing the purchase is a question which the State alone can inquire into in a direct proceeding against the corporation.

There is a presumption that a conveyance to a corporation is for a purpose for which it is authorized to acquire and hold real property.<sup>1</sup>

When a corporation is limited to acquiring and holding lands to a certain value, any increase in the value of lands after they have been acquired, so that they afterwards exceed the prescribed amount in value, does not affect its title to such lands.<sup>2</sup>

II. *Restrictions upon Foreign Corporations.*

182. A foreign corporation, authorized to hold real estate by the State creating it, may purchase and hold real estate in another State in which it is permitted to transact business, unless restricted or prohibited by the statute or manifest policy of the latter State.<sup>3</sup> Upon the principle of comity, a foreign corporation may exercise within another State the general powers conferred by its own charter, provided these are not inconsistent with the laws or public policy of such other State.<sup>4</sup> The law of comity

Hamsher, 132 Ill. 273, 286, 23 N. E. Rep. 1123; *Hayward v. Davidson*, 41 Ind. 212; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *De Camp v. Dobbins*, 29 N. J. Eq. 36, 31 N. J. Eq. 671, 691; *Goundie v. Northampton W. Co.* 7 Pa. St. 233. *Contra*, *St. Peter's Cong. v. Germain*, 104 Ill. 440, 446, per Mulkey, J.

<sup>1</sup> *Yates v. Van De Bogert*, 56 N. Y. 526; *Farmers' L. & T. Co. v. Curtis*, 7 N. Y. 466; *Chautauqua Co. Bank v. Rialley*, 19 N. Y. 369; *Ex parte Peru Iron Co.* 7 Cow. 540; *Lancaster v. Amsterdam Imp. Co.* 140 N. Y. 576, 35 N. E. Rep. 964, 9 Am. R. R. & Corp. Rep. 155, 161; *Alward v. Holmes*, 10 Abb. N. C. 96; *Farmers' & Millers' Bank v. Detroit*, &c. R. Co. 17 Wis. 372; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536.

<sup>2</sup> *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Humbert v. Trinity Church*, 24 Wend. 587, 639.

<sup>3</sup> *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. Rep. 477, 13 Am. & Eng. Corp. Cas. 7; *Santa Clara Academy v. Sullivan*, 116 Ill. 375, 6 N. E. Rep. 183, 56 Am. Rep.

776, 13 Am. & Eng. Corp. Cas. 11; *White v. Howard*, 38 Conn. 342; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73; *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381; *Carlow v. Aultman*, 28 Neb. 672, 44 N. W. Rep. 873; *Newburg Petroleum Co. v. Wear*, 27 Ohio St. 343; *Alward v. Holmes*, 10 Abb. N. C. 96; *Claremont Bridge v. Royce*, 42 Vt. 730; *State v. Boston, C. & M. R. Co.* 25 Vt. 433; *Taylor v. Alliance Trust Co.* 71 Miss. 694, 15 So. Rep. 121; *Missouri Lead Min. Co. v. Reinhard*, 114 Mo. 218, 21 S. W. Rep. 488.

<sup>4</sup> *Christian Union v. Yount*, 101 U. S. 352; *Cowell v. Springs Co.* 100 U. S. 55; *Runyan v. Coster*, 14 Pet. 122; *Bank of Augusta v. Earle*, 13 Pet. 519, 592; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73; *Northern Transp. Co. v. Chicago*, 7 Biss. 45; *New York Dry Dock v. Hicks*, 5 McLean, 111; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. Rep. 183, 56 Am. Rep. 776; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Claremont Bridge Co. v. Royce*, 42 Vt. 730;

between States will not authorize a corporation to exercise powers within the State which a domestic corporation would not be permitted to exercise under the Constitution and policy of the State.<sup>1</sup> But on the other hand, the rule is almost universal that a foreign corporation may transact, in pursuance of its charter, any business which the laws and policy of a State encourage a domestic corporation to engage in, and may exercise any powers which such domestic corporation might exercise.<sup>2</sup>

183. What the public policy of a State is upon this matter is determined by its constitution, laws, and judicial decisions.<sup>3</sup> If the Constitution and laws of a State are silent, it may properly be inferred that the general law of comity between States has scope for operation, and that a foreign corporation legally constituted, with sufficient chartered powers, may acquire and hold lands in the State of its domicile.<sup>4</sup>

The fact that foreign corporations have in particular cases procured acts enabling them to hold real estate, the general laws being silent on the subject, does not disprove the general right

*Thompson v. Waters*, 25 Mich. 214, 223, 12 Am. Rep. 243, per Christiancy, C. J.; *Taylor v. Alliance Trust Co.* 71 Miss. 694, 15 So. Rep. 121; *Whitman Mining Co. v. Baker*, 3 Nev. 386; *Tarpey v. Deseret Salt Co.* 5 Utah, 494, 17 Pac. Rep. 631; *Fisk v. Patton*, 7 Utah, 399, 27 Pac. Rep. 1; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109; *Reorganized Church v. Church of Christ*, 60 Fed. Rep. 937, 941.

<sup>1</sup> *Clarke v. Central R. Co.* 50 Fed. Rep. 338.

<sup>2</sup> *Taylor v. Alliance Trust Co.* 71 Miss. 694, 15 So. Rep. 121.

<sup>3</sup> *Vidal v. Girard*, 2 How. 127, per Story, J.

<sup>4</sup> *Lancaster v. Amsterdam Imp. Co.* 140 N. Y. 576, 35 N. E. Rep. 964, per Gray, J.; *Bard v. Poole*, 12 N. Y. 495; *Taylor v. Alliance Trust Co.* 71 Miss. 694, 15 So. Rep. 121; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. Rep. 145; *New York Dry Dock v. Hicks*, 5 McLean, 111; *Missouri Lead Co. v. Reinhard*, 114 Mo. 218, 21 S. W. Rep. 488; *Reorganized Church v. Church of Christ*, 60 Fed. Rep. 937, 941.

In *Lancaster v. Amsterdam Imp. Co.* 140 N. Y. 576, 35 N. E. Rep. 964, Mr. Justice Gray said: "If we turn to the decisions of this court in our investigation of what has been the public policy of this State towards foreign corporations, we find them interpreting and applying the principle of state comity in the broadest spirit. In *People v. Fire Association*, 92 N. Y. 311, it was observed that 'where a State does not forbid, or its public policy, as evidenced by its laws, is not infringed, a foreign corporation may transact business within its boundaries, and be entitled to the protection of its laws.' In *Hollis v. Drew Seminary*, 95 N. Y. 166, it was held that, 'unless the legislature forbids, they [foreign corporations] can come here as freely as natural persons, and exercise here all the powers conferred upon them by their charter, subject to the limitation imposed upon natural persons, that is, they can do no acts in violation of our laws, or of our public policy; but, unless prohibited by law, they can do here, within the limits of their chartered powers, precisely what domestic corporations can do.'"

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of such corporations to hold land without such enabling acts, nor does it show that the public policy is against such general right.<sup>1</sup>

184. The policy of a State not to allow foreign corporations to acquire and hold real estate must be expressed in some affirmative way by the legislature. Though it is provided that foreign corporations shall exercise no greater or different powers than those exercised by domestic corporations, the fact that the legislature has made no provision for the formation of corporations authorized to loan money, and take mortgages upon real property to secure them, is no indication of a policy to prohibit the exercise of these powers by a foreign corporation organized for such purpose.<sup>2</sup>

Under a statute which provides that foreign corporations shall not acquire and hold real estate unless specially authorized to do so, a purchase by a railroad company, by legislative authority, of the stock of a mining company authorized by law to hold real estate is not invalid, and the land cannot be forfeited to the State under a proceeding for that purpose.<sup>3</sup>

Although a constitutional provision prohibits a non-resident railroad company from acquiring lands for the use of the road by condemnation or appropriation, still it may acquire such lands by purchase.<sup>4</sup>

185. Any State may repeal, restrict, or refuse to recognize this law of comity, for foreign corporations are not citizens within the meaning of the Constitution of the United States, and

<sup>1</sup> *Lancaster v. Amsterdam Imp. Co* 140 N. Y. 576, 35 N. E. Rep. 964.

<sup>2</sup> *Cowell v. Springs Co.* 100 U. S. 55; *Christian Union v. Yount*, 101 U. S. 352; *Hards v. Conn. Mut. L. Ins. Co.* 8 Bias. 234; *Stevens v. Pratt*, 101 Ill. 206, overruling *United States Mortg. Co. v. Gross*, 93 Ill. 483. The latter case was decided on the authority of *Carroll v. East St. Louis*, 67 Ill. 568. In that case it was held that a foreign corporation, created for the sole purpose of buying and selling lands, had no power to purchase and hold lands in Illinois; that such corporation, if permitted to exercise its functions in Illinois to the full extent authorized by its charter, could acquire lands without limit as to quantity, and hold them in perpetuity; that such

privileges had never been accorded by Illinois to her own domestic corporations, and were inconsistent with her settled public policy against perpetuities, as indicated, not by express enactment, but with absolute certainty, by the general course of its legislation from the very organization of the State. This decision is discarded by the decisions of the Supreme Court of the United States, and by the later decisions in Illinois.

<sup>3</sup> *Commonwealth v. New York, &c. R. Co.* 132 Pa. St. 591, 19 Atl. Rep. 291, reaffirmed 139 Pa. St. 457, 21 Atl. Rep. 528, reversing 114 Pa. St. 340, 7 Atl. Rep. 756, 15 Am. & Eng. Corp. Cas. 410.

<sup>4</sup> *St. Louis & S. F. R. Co. v. Foltz*, 52 Fed. Rep. 627.

are not entitled to the protection guaranteed to citizens.<sup>1</sup> Under a statute which provides that no corporation shall have power to enter into the business of buying and selling real estate, a foreign corporation which engages in this business and buys real estate in the name of a trustee acquires the beneficial interest in such land and may enforce the trust.<sup>2</sup>

186. A foreign corporation may take a mortgage to secure a demand on which it could maintain an action, though it is not authorized by its charter, or by the laws of the State in which it is acting, to take mortgages or hold real property.<sup>3</sup>

A foreign corporation may take a mortgage as additional secu-

<sup>1</sup> *Elston v. Piggott*, 94 Ind. 185; *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *United States Trust Co. v. Lee*, 73 Ill. 142, 24 Am. Rep. 236; *U. S. Mortg. Co. v. Gross*, 93 Ill. 483, 493.

<sup>2</sup> *Fisk v. Patton*, 7 Utah, 399, 27 Pac. Rep. 1. See *Carroll v. East St. Louis*, 67 Ill. 568, where it was held that a foreign corporation, organized for this purpose, could not take title in Illinois, this being in contravention of the policy of the law of that State. In *Bard v. Poole*, 12 N. Y. 495, upon the question of the right of a corporation of the State of Maryland to take mortgages of real estate within the State of New York, the Court of Appeals of the latter State said: "Any of the States of the Union may, as this and several of the other States have done, interdict foreign corporations from performing certain single acts, or conducting a particular description of business, within its jurisdiction. But in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law, and not inconsistent with the policy of the State as indicated by the general scope of its laws or institutions, corporations are permitted by the comity of nations to make contracts and transact business in other States than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the courts of such other States. It is, of course, implied that the contract must be one which the foreign corporation is

permitted by its charter to make; and it must also be one which would be valid if made at the same place by a natural person not a resident of that State."

In *United States v. Fox*, 94 U. S. 315, 320, holding void a devise of land to the United States, Mr. Justice Field said: "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." Affirming *Matter of Will of Fox*, 52 N. Y. 530, 63 Barb. 157, 11 Am. Rep. 751.

<sup>3</sup> *American Mut. L. Ins. Co. v. Owen*, 15 Gray, 491; *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Farmers' Loan & T. Co. v. McKinney*, 6 McLean, 1; *New York Dry Dock Co. v. Hicks*, 5 McLean, 111; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109; *Connecticut Mut. L. Ins. Co. v. Albert*, 39 Mo. 181; *Elston v. Piggott*, 94 Ind. 14; *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381.

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rity, though its charter does not authorize it to take mortgages in another State. Thus, where a New York corporation was authorized by its charter to take "mortgages on unincumbered real estate in the State of New York worth double the amount loaned thereon," it may take a mortgage of land in New Jersey to secure a loan already legitimately made to the mortgagor. If it be conceded that the charter forbids the making of an investment on a mortgage of real estate not in the State of New York, it does not prohibit the taking of further security for an investment already made within the authority of the charter.<sup>1</sup>

One who deals with a foreign corporation by borrowing money of it, and giving a mortgage as security, is estopped to claim that it had no authority to take mortgages in that State, and cannot set up this answer in a foreclosure suit upon the mortgage.<sup>2</sup>

187. In a few States foreign corporations have at different times been prohibited from making loans and taking security upon real estate therefor. A mortgage within such a prohibition is invalid from its delivery, and consequently a sale and conveyance under it is nugatory, and does not divest the owner of his interest in the mortgaged premises.<sup>3</sup>

A constitutional or statutory provision that no foreign corporation shall do "any business" in a State, without having at least one known place of business and an authorized agent therein, is violated by a single act of making one loan of money, and taking a mortgage to secure it, by a foreign corporation engaged in the business of loaning money on mortgages, when it has no place of business or agent in the State. In such case the promise of the mortgagor to pay is void, and a bill to foreclose the mortgage cannot be maintained.<sup>4</sup> In a suit under such a provision to fore-

<sup>1</sup> *National Trust Co. v. Murphy*, 30 N. J. Eq. 408.

<sup>2</sup> *Pancoast v. Traveller's Ins. Co.* 79 Ind. 172; *Leasure v. Union Mut. L. Ins. Co.* 91 Pa. St. 491.

<sup>3</sup> *Alabama*: Const. § 4, art. 14; *New England Mortg. Co. v. Powell*, 94 Ala. 423, 10 So. Rep. 324, 97 Ala. 483, 12 So. Rep. 55. *Illinois*: Prior to the act of 1875 (Laws of 1875, p. 65) repealing the former statute, and confirming and validating prior loans made in contravention of it. *Scammon v. Commercial Union*

*Assurance Co.* 6 Bradw. 551; *United States Mortgage Co. v. Gross*, 93 Ill. 483. And see *Hards v. Conn. Mut. L. Ins. Co.* 8 Bias. 234. In *Pennsylvania* a foreign corporation may enforce a mortgage upon lands in that State. *Leasure v. Union Mut. Life Ins. Co.* 91 Pa. St. 491.

<sup>4</sup> *Farrior v. Security Co.* 88 Ala. 275, 7 So. Rep. 200, 92 Ala. 176, 9 So. Rep. 532; *Dudley v. Collier*, 87 Ala. 431, 6 So. Rep. 304.

close a corporate mortgage, the complaint must aver that the corporation was authorized to do business in the State at the time the mortgage was executed and delivered. A complaint which states that complainant has complied with the laws of the State which authorize a foreign corporation to do business in the State, and that the mortgage sued on was executed and delivered in the State, is not sufficient.<sup>1</sup> But though a mortgage was originally invalid by reason of the failure of the mortgagee, a foreign corporation, to comply with such laws, after the contract evidenced by the mortgage has been fully executed by a sale and conveyance under the mortgage the mortgagor cannot thereafter avail himself of the objection.<sup>2</sup>

188. In many of the States foreign corporations are, by statute or by public policy, placed upon an equal footing with domestic corporations as to the transaction of corporate business and the holding of real property. In only a part of the States are there statutes expressly conferring or restricting the power of such corporations to acquire and hold land;<sup>3</sup> and where

<sup>1</sup> *Mullens v. Mortgage Co.* 88 Ala. 280, 7 So. Rep. 201.

<sup>2</sup> *Gamble v. Caldwell*, 98 Ala. 577, 12 So. Rep. 424.

<sup>3</sup> *Arizona T.*: Any foreign corporation, upon complying with the laws in respect to transacting business in the Territory, may acquire, hold, and dispose of all kinds of real and personal property, and enjoy the same rights and privileges that domestic corporations have; provided that no such corporation shall hold or own at any one time more than three hundred and twenty acres of land, exclusive of mines and mineral lands, and land necessary for reducing or working ores, or for manufacturing or commercial purposes. R. S. 1887, § 352. *Colorado*: Shall not hold real estate except such as may be necessary, as for the transaction of its business. Annot. Stats. 1891, § 499. *Georgia*: Shall not own more than five thousand acres of land in this State, except upon the condition of becoming a corporation under the laws of the State. This provision does not apply to any corporation engaged in the business of lend-

ing money on real estate, nor to any such corporation which, holding a lien upon real estate for security, is compelled to become the purchaser of such real estate. Laws 1893, p. 33. *Idaho*: Have all the rights and privileges of domestic corporations, including the right to exercise the right of eminent domain. R. S. 1887, § 2653. *Illinois*: Are subjected to all the liabilities and restrictions imposed upon domestic corporations of like character, and have no other or greater powers. R. S. 1889, ch. 32, § 26; *Stevens v. Pratt*, 101 Ill. 206, 217; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. Rep. 183. *Indiana*: The right to hold titles to or liens upon real estate is made conditional upon their complying with the laws of the State in regard to appointing an agent within the State. Annot. Stats. 1894, § 3461. *Iowa*: Cannot exercise the right of eminent domain, or any of the rights and privileges conferred upon domestic corporations, until they have received permit to transact business in the State. Annot. Code 1888, § 1642. *Kentucky*: Are subject to the laws relating to



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there are no statutes upon the subject, the right of comity is generally recognized.

189. The power and right of a foreign corporation to acquire and hold real property is determined by its charter and the laws of the State in which the property is situated.<sup>1</sup> The laws of the State in which the corporation was organized are not recognized as affecting the capacity of the corporation in this respect. "A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty,'<sup>2</sup> though it may do

domestic relations of similar character. No foreign railroad company is entitled to the benefit of eminent domain, or has power to acquire real estate, until it shall have become a body corporate under the laws of the State. Const. 1891, §§ 202, 211; G. S. 1894, pp. 139, 141. **Massachusetts**: Cannot engage in any kind of business the transaction of which by domestic corporations is not permitted. Acts 1894, ch. 381. Manufacturing corporations which have complied with Acts 1884, ch. 330, may purchase and hold such real estate as may be necessary for conducting their business. Acts 1898, ch. 321. **Minnesota**: Foreign corporations created for the purpose of buying and selling lands cannot hold more than one thousand acres, and must sell the same within twenty-one years, except that lands acquired under mortgage foreclosure must be disposed of within fifteen years. G. S. 1894, § 3420. **Nebraska**: Foreign corporations become domestic corporations upon filing the proper certificate. Comp. Stats. ch. 16, § 215. **New Hampshire**: Foreign manufacturing companies may acquire, hold, and convey real and personal property. P. S. 1891, ch. 148, § 21. **New Jersey**: May acquire, hold, mortgage, and convey real estate necessary for its business, or acquired by way of mortgage or in payment of debts. R. S. 1877, Corp. Acts, § 99; Laws 1887, p. 157. **New Mexico**: Shall not hold real estate except as provided in relation to domestic corporations. Corp. Laws 1884, § 218. **New York**: Any foreign corporation doing business in this State may acquire such real property as

may be necessary for its corporate purposes, and may convey the same in the same manner as a domestic corporation. Such corporation may purchase, at a sale upon foreclosure of a mortgage held by it or upon a judgment, any real property, and may hold the same for not exceeding five years. Laws 1892, ch. 687, §§ 17, 18. **North Dakota, Oklahoma, and South Dakota**: Cannot acquire, hold, or dispose of real or personal property until it has filed a copy of its charter. G. S. 1893, § 1167; Comp. Laws Dak. 1887, § 3190. **Pennsylvania**: Foreign corporations may become corporations of the State under the provisions regulating corporations of the same class. Brightly's Purdon's Dig. 1894, p. 937. **Tennessee**: May hold real estate necessary or suitable for carrying on the business specified in the charter. Code 1884, § 1995. **Washington**: Have full power to acquire, hold, mortgage, and convey all real estate necessary or convenient to carry into effect the purposes of the corporation. G. S. 1891, § 1524. **West Virginia**: Have the same powers and privileges, and are subject to the same restrictions, as domestic corporations. Code 1891, ch. 54, § 30.

<sup>1</sup> *Tarpey v. Deseret Salt Co.* 5 Utah, 494, 17 Pac. Rep. 631; *White v. Howard*, 38 Conn. 342; *Thompson v. Waters*, 25 Mich. 214, 12 Am. Rep. 243; *Nicholson v. Leavitt*, 4 Sandf. 272, 276; *Sherwood v. American Bible Soc.* 4 Abb. App. Dec. 227.

<sup>2</sup> *Bank of Augusta v. Earle*, 13 Pet. 519, 588.

business in all places where its charter allows and the local laws do not forbid.<sup>1</sup> But wherever it goes for business it carries its charter, as that is the law of its existence,<sup>2</sup> and the charter is the same abroad that it is at home."<sup>3</sup>

If a foreign corporation is limited by its charter as to its power to acquire and hold land, the courts of another State where it acquires land may undoubtedly enforce this limitation, though it would seem that the legislature of the latter State might empower such corporation to acquire and hold land without limit in that State.<sup>4</sup> In the latter case the title to the land acquired would pass to the corporation, and it would be for the State under whose laws it was organized to enforce the restrictions imposed by its laws. But it is for the courts of the State in which the land is situated to determine not only its capacity under the laws of that State to acquire and hold real estate, but also its capacity to do so under its charter. An adjudication upon the question of its corporate capacity by a court of another State has no further effect or authority than the reasoning upon which it may have been founded gives it.<sup>5</sup>

Where a foreign corporation is by its charter competent to take land, the statute of wills of the State in which it was created, prohibiting devises of the lands to corporations, does not prohibit it from taking and holding land in another State by devise of one of its own citizens. Such a statute defines the capacity of testators and not of corporations.<sup>6</sup> Where the charter of a foreign corporation is sufficiently broad to confer upon it the capacity to take and hold real estate by devise, though not expressly so authorized, the statute of wills of the State where the corporation was created, providing that "no devise of real estate to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise," is operative only in that State, and does not affect the capacity of the corporation to take by devise in another State.<sup>7</sup>

<sup>1</sup> *Railroad v. Koontz*, 104 U. S. 5, 12.

<sup>2</sup> *Relfe v. Rundel*, 103 U. S. 222, 226.

<sup>3</sup> *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 537, 3 S. Ct. Rep. 363, per Waite, C. J.

<sup>4</sup> *Whitman Mining Co. v. Baker*, 3 Nev. 386.

<sup>5</sup> *Boyce v. St. Louis*, 29 Barb. 650.

<sup>6</sup> *Thompson v. Swoope*, 24 Pa. St. 474.

And see *Hollis v. Drew Theological Seminary*, 95 N. Y. 166.

<sup>7</sup> *American Bible Soc. v. Marshall*, 15 Ohio St. 537.

There are a few cases, however, in which it has been said that a devise to a foreign corporation, void by the laws of

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190. The question whether a foreign corporation can acquire and hold land is a question which can be determined only by the State in a proceeding instituted for that purpose.<sup>1</sup> The rule is the same as that which prevails as to domestic corporations, when the question is raised whether they have exceeded their corporate powers.<sup>2</sup> Even in case a foreign corporation is prohibited from acquiring and holding real estate, the State alone can object to the legal capacity of the corporation to take and hold real estate.<sup>3</sup> Whether the right of a foreign corporation to hold lands arises under the terms of its charter, or of the laws of the State under which it is organized, or whether it arises with reference to its authority under the laws of the State in which the lands are situated, the right can be questioned only by the State itself in which the land is situated.<sup>4</sup>

By the Constitution of the State of Nebraska, no foreign railroad corporation has power to acquire land for any purpose until it has become a body corporate under the laws of that State; but a conveyance of land to the Union Pacific Railway Company, which had not complied with this provision, and was therefore incompetent to take title, was held to be voidable only and not void. The title of the company, it was declared, was valid against every one but the State, and could not be questioned by any one in a suit in ejectment brought against the company.<sup>5</sup>

the State where it was organized, is void in another State in which the testator resided and was a citizen; that such statute affects the power to take as well as the power to devise. *Kerr v. Dougherty*, 79 N. Y. 327; *Boyce v. St. Louis*, 29 Barb. 650; *Starkweather v. American Bible Soc.* 72 Ill. 50, 22 Am. Rep. 133. The latter case was overruled in *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. Rep. 183, 56 Am. Rep. 776, and the New York cases are not regarded now as good law.

<sup>1</sup> *Cowell v. Springs Co.* 100 U. S. 55; *Seymour v. Slide & Spur Gold Mines*, 153 U. S. 523, 14 Sup. Ct. Rep. 847; *Fritts v. Palmer*, 132 U. S. 282; *Runyan v. Coster*, 14 Pet. 122; *Reorganized Church v. Church of Christ*, 60 Fed. Rep. 937; *Hickory Farm Oil Co. v. Buffalo*, N. Y. & P. R. Co. 32 Fed. Rep. 22;

*Barnes v. Suddard*, 117 Ill. 237, 7 N. E. Rep. 477; *Alexander v. Tolletson Club*, 110 Ill. 65; *Silver Lake Bank v. North*, 4 Johns. Ch. 370, per Chancellor Kent; *American Mortg. Co. v. Tennille*, 87 Ga. 28, 13 S. E. Rep. 158; *O'Brien v. Wetherell*, 14 Kans. 616; *Leazure v. Union Mut. L. Ins. Co.* 91 Pa. St. 491; *Grant v. Henry Clay Coal Co.* 80 Pa. St. 208; *Leazure v. Hellegas*, 7 S. & R. 313.

<sup>2</sup> § 175.

<sup>3</sup> *Hickory Farm Oil Co. v. Boston*, N. Y. & P. R. Co. 32 Fed. Rep. 22; *Carlow v. Aultman*, 28 Neb. 672, 44 N. W. Rep. 873.

<sup>4</sup> *American Mortg. Co. v. Tennille*, 87 Ga. 28, 13 S. E. Rep. 158.

<sup>5</sup> *Myers v. McGavock*, 39 Neb. 843, 58 N. W. Rep. 522. The court say: "The Union Pacific Railway Company, because it took title to this property in violation of

191. If there are legal purposes for which a foreign corporation may hold land, but it is unlawful for it to deal in real estate, its capacity to hold any particular piece of land cannot be attacked by any private litigant, but only by the State. Thus, where a foreign corporation authorized by its charter to deal in real estate was admitted to do business in Texas, by whose laws neither a foreign nor a domestic corporation could lawfully prosecute this business, though they expressly provided that any corporation might acquire such real estate as the purposes of the corporation might require, it was held that the capacity of the corporation to hold land in any particular instance could not be questioned collaterally in an action of trespass brought by the corporation to try title.<sup>1</sup> The Court of Appeals said: "For the purposes of this case it may be conceded that the business, as such, which is thus provided for, could not be lawfully prosecuted in Texas, either by a foreign or domestic corporation. It is yet apparent that several of the purposes for which this company was chartered were provided for by our statute as objects for the promotion of which corporations could be formed. If it be conceded that the charter contained a provision not authorized by the law, it would not follow that the formation of the corporation was for that reason illegal and void, but it would be good for the purposes which were authorized by law, but without power to pursue those which were not. . . . The pursuit of other purposes mentioned in the articles than the one quoted above would evidently necessitate the purchase of land; and it follows that the company had the capacity to take title to that in controversy, whether, as against the State, it could hold such title or not. The question, whether or not the land conveyed to it was such as the company could hold under its charter, cannot be raised collaterally and liti-

the Constitution, did not thereby become an outlaw; nor does the fact of its incompetency to be a grantee of such property authorize any one to appropriate the property who may see fit to bring a suit for that purpose. The citizen has no right, title, or claim, as such, to property attempted to be acquired in contravention of law, whether the person attempting such acquisition be an English lord, a Turkish pasha, or an ordinary foreign

railroad company. It would be a monstrous construction of this Constitution to say if A should, for a valuable consideration, convey his real estate to B, that because B was incompetent under the law to take such conveyance, therefore the title should revert to A."

<sup>1</sup> Galveston Land & Imp. Co. v. Perkins (Texas Civ. App.), 26 S. W. Rep. 256, 258.

gated in this action. Such land was conveyed to it by a person with whom the defendants had no connection, and under whom they asserted no rights. As the plaintiff was a corporation competent to hold land, the conveyance to it of that in controversy passed the title. It had capacity to take the title, and to hold the land against any person but the State. Whether it can hold against the sovereign is a question which can be decided only in a proper proceeding instituted for that purpose."

192. The question whether a foreign corporation is violating a local statute in acquiring real estate is one which belongs to the State alone, which may dispute or prevent such usurpation of power or may acquiesce in it. A provision of the Constitution of Missouri that "no religious corporation can be established in this State, except such as may be created under a general law, for the purpose only of holding title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries," does not prohibit the existence of such corporations, nor deny their right to hold real estate. It limits their creation to a general law. The fact that the legislature of the State has not prescribed the quantity of real estate to be held by such corporations affords no ground for claiming that the State has refused to recognize the right of foreign religious corporations to hold land in the State. The court will not undertake, in a collateral proceeding, to determine whether the land acquired by such a corporation was necessary for the purpose declared by the Constitution.<sup>1</sup>

The acts of a foreign corporation duly organized, which undertakes to transact business in a State without having complied with the Constitution and laws of that State in relation to transacting business and owning and disposing of property, are not void, and cannot be questioned or determined collaterally. It rests with the State in a direct proceeding to prevent the corporation from exercising its franchises within the State until it has fully complied with its Constitution and laws.<sup>2</sup>

Thus an individual dealing with a foreign corporation, which is authorized to acquire such real property as may be necessary for its corporate purposes, cannot object to its title to land on the ground that it has exceeded its authority by engaging in the busi-

<sup>1</sup> Reorganized Church v. Church of W. Rep. 706, and on rehearing, 55 N. W. Christ, 60 Fed. Rep. 937.

<sup>2</sup> Wright v. Lee, 2 S. D. 596, 51 N.

ness of buying and selling real property, when the laws of the State under which it was organized conferred some authority to engage in such business, or to acquire and convey land. It is for the State under whose laws the corporation was created to inquire into any excessive use of its corporate powers. It is for the State where the foreign corporation is transacting business to inquire whether it is violating the laws of that State in engaging in the business of buying and selling land. "It is not for the party contracting for the conveyance of its land to raise the question of how far his grantor may have exceeded the authority given by the statutes of the State, any more than he might with respect to an alleged abuse of the powers conferred by its home charter. Those are questions between the corporation and the government." <sup>1</sup>

<sup>1</sup> *Lancaster v. Amsterdam Imp. Co.* 140 reversing 72 Hun, 18, 25 N. Y. Supp. N. Y. 576, 35 N. E. Rep. 964, 9 Am. R. 309.  
R. & Corp. Rep. 155, 161, per Gray, J.,



## **BOOK II.**

**ESTATES IN FEE AND THEIR TRANSFER BY DEED.**



**CHAPTER**

- XIII. DEEDS OF CONVEYANCE AND THEIR FORMS.**
- XIV. PARTIES TO DEEDS AND THEIR DESCRIPTION.**
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## BOOK II.

### ESTATES IN FEE AND THEIR TRANSFER BY DEED.

#### CHAPTER XIII.

##### DEEDS OF CONVEYANCE AND THEIR FORMS.

193. It is probable that transfers of land were originally made by means of the delivery upon the land of something pertaining to it, such as a piece of turf, or a bough from a tree, accompanied by words signifying an intention to transfer the land. In the times of the Anglo-Saxons in England, before the Norman Conquest, grants of public land were made by the king as the chief of the community, with the assent of his witan, by means usually of a "book" or charter. The land thus granted was called bocland or bookland. Whether the land was actually considered as transferred by the book, as in modern conveyances, is uncertain, but the analogy of the practice of other nations would seem to show that something in the nature of a symbolical delivery would be considered essential.<sup>1</sup>

194. When land in England, after the Norman Conquest, came to be held by feudal tenure, it was transferred by livery of seisin without a deed, a custom in imitation of the ancient feudal investiture. The two essential elements of a conveyance of a freehold interest in it were, first, a formal delivery of possession, called livery of seisin; and, second, words accompanying such delivery indicating the nature and extent of the grantee's interest and the service to be rendered for it.<sup>2</sup> This mode of

<sup>1</sup> Digby's Hist. of the Law of Real Property, 4th ed. 13 and note.

<sup>2</sup> Digby's Hist. of the Law of Real Property, 4th ed. 49. Seisin means possession, as of freehold, that is, the possession which a freeholder could assert and maintain by appeal to law. "There was a seisin as of right, and a seisin as of wrong.

If the rightful freeholder was ousted and in fact lost his possession, he was disseised, or put out of seisin, and the wrongdoer or disseisor was seised in his place, holding by wrong the estate from which he had ousted the rightful possessor." Digby's Hist. of the Law of Real Property, 4th ed. 108.

conveying land was termed a feoffment. The grantor was the feoffor, the grantee the feoffee. Livery of seisin was made either by the feoffor or by his deputy. The delivery of something on the land was not an essential part of the ceremony; but it was essential to an actual delivery of possession, or livery in deed, that the parties should be actually present on the land, and that possession should be delivered either by act or word. A livery in law took place when the transaction was made in sight of the land but not upon it, and was followed by an entry of the feoffee during the lifetime of the feoffor.<sup>1</sup>

Notoriety was given to the transaction by making delivery upon the land, and much importance was attached to this. "That all the neighbors might know that A was tenant to B from the fact that open livery of seisin had been made to him, was of the utmost importance to B, in order to protect him and enable him to assert his rights as lord."<sup>2</sup>

195. Sometimes livery of seisin was accompanied by the delivery of a deed, which served to define more accurately the nature and terms of the transfer, but no deed was necessary; and when it was used the lands were supposed to be transferred, not by the deed, but by the livery.<sup>3</sup> The apt words of conveyance in a deed of feoffment were "give and grant." The conveyance was primarily a gift, the only consideration being the feudal service which the feoffee was expected to render to the feoffor.<sup>4</sup>

While it was not essential that the words of gift or transfer should be embodied in a deed, it was usual to execute a charter of feoffment, in order to preserve the evidence of the grant. Bracton gives a specimen of such a charter.<sup>5</sup>

<sup>1</sup> Co. Litt. 48 b; Digby's Hist. of the Law of Real Property, 4th ed. 146.

<sup>2</sup> Digby's Hist. of the Law of Real Property, 4th ed. 146.

<sup>3</sup> McCabe v. Hunter, 7 Mo. 355.

<sup>4</sup> Poe v. Domec, 48 Mo. 441, 443, per Bliss, J.

<sup>5</sup> Bracton, lib. ii. ch. 16, fol. 346. It is in the following words: "Know all persons, now and hereafter, that I, A B, have given and granted, and by this present charter of mine have confirmed to C D, in return for his homage and service, so much land, with its appurtenances, in such

a township, to have and to hold to C D and his heirs (either generally or with some limitation of heirs) or assigns, freely and peaceably, rendering for the same so much by the year at such and such fixed terms, and performing for the same such services and such customs in lieu of all service custom, secular exaction, and demand," by which general expression it appears that all other articles, customs, and secular demands which belong to the lord from the tenement are expressly released, although no express words to this effect are contained in the charter.

196. But a deed alone was ineffectual to transfer the title. "A gift is not valid," said Bracton, writing in the time of Henry III.,<sup>1</sup> "unless it be followed by delivery of possession, because the subject of the gift is not transferred by homage, or by the execution of deeds or instruments, although they may have been read in public." The following from a recent judgment by Lord Justice Fry illustrates the importance formerly attached to the delivery of possession, or the livery of seisin: "In Bracton's day, seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham as to a manor or a field. At that time the distinction between real and personal property had not yet grown up: the distinction then recognized was between things corporeal and things incorporeal; no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal; the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognized seisin as the common incident of all property in corporeal things, and tradition, or the delivery of that seisin from one man to another, as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal. This necessity for delivery of seisin has disappeared from a large part of the transactions known to our law, but it has survived in the case of feoffments."<sup>2</sup>

197. After a time a writing or deed in connection with a feoffment became more and more important, and served to declare uses and trusts, and to record the limitations of the estates transferred. Finally, by the statute of frauds,<sup>3</sup> a feoffment made by livery of seisin only, and not accompanied by an instrument in writing signed by the feoffor, or his agent lawfully authorized in writing, had the effect of creating an estate at will only.<sup>4</sup>

An incorporeal right or easement could be created and conveyed only by deed. In the language of the common law an incorpo-

<sup>1</sup> Bracton, lib. ii. ch. 18, fol. 39.

<sup>2</sup> *Cochrane v. Moore*, 25 Q. B. Div. 57, 65, per Fry, Lord Justice.

<sup>3</sup> 29 Charles II. ch. 3.

<sup>4</sup> Bythewood & Jarman's *Conveyancing*, 4th ed. vol. v. p. 3. So by statute in many American States.

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real hereditament was said to lie in grant, and could not be created or transferred, as lands could be, by livery of seisin.

198. **The Statute of Uses.** — In equity the performance of any use declared upon the feoffment could be enforced, and advantage was taken of this means by the monasteries and other religious corporations to evade the mortmain laws, and to keep secret the actual beneficial ownership of land. The preamble of the Statute of Uses<sup>1</sup> recites at length the evils of this practice, declaring that “divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts.” The statute transferred the estate, title, right, and possession, that was in the person legally seised of the land to the use of another person, directly to such other person. It made the beneficial owner the legal owner.

The purpose of the statute was to compel all conveyances to be made directly to the beneficial owner, in order that the king and lords might not be deprived of the profits and advantages to which they were entitled under the feudal system. It failed in the purpose, because the courts of equity decided that the statute, having operated once in executing the use and turning it into a legal seisin, was thenceforth *functus officio*. It therefore became possible, by the addition of a further use, to create trust estates with the same facility as before. The courts favored less restricted dealings with land, and in this instance, as in others, found means to nullify feudal legislation.<sup>2</sup>

The consequences of the Statute of Uses have been great and far-reaching. “They continue to the present day. What may be called the modern law of real property, and the highly technical and intricate system of conveyancing which still prevails, dates from the legislation of Henry VIII.”<sup>3</sup>

199. **The deed of lease and release had its origin in the Statute of Uses.** It was a contrivance to avoid livery of seisin and the restrictions of the statute. A lessee for years having entered into possession of the land, though he was not considered as having feudal seisin, had the actual possession, so that there

<sup>1</sup> 27 Henry VIII. ch. 10.

<sup>3</sup> Digby's Hist. of the Law of Real

<sup>2</sup> 5 Bythewood's Precedents, 4th ed. Property, 4th ed. 345.  
4-7; Croxall v. Sherard, 5 Wall. 268.

was no occasion for any livery of seisin, nor would such livery be possible unless he surrendered his lease. He was therefore in a position to acquire his landlord's interest, without any livery of seisin, by a deed of release. Leases for years were accordingly made for the express purpose of afterwards conveying the landlord's interest to the lessee, and thus avoiding the publicity of a livery of the seisin.<sup>1</sup> This form of conveyance became the usual form in England, and continued so to be till the year 1841, when by act of Parliament<sup>2</sup> a release was declared to be as effectual for the conveyance of freehold estates as a lease and release.

2CO. The deed of bargain and sale was another form of conveyance devised for the purpose of avoiding the publicity of conveyance by livery of seisin. A deed of release could only be made in case the lessee had actually entered under his lease. The necessity of such an entry was avoided by a bargain and sale. "A bargain was made for the sale of an estate; the purchase-money was paid; but there was either no conveyance at all of the legal interest, or a conveyance defective at law by reason of the omission of livery of seisin, or attornment: the court of chancery properly thought that the estate ought in conscience to belong to the person who paid the money, and therefore considered the bargainor as a trustee for him. But the *cestui que trust* had only an equitable interest."<sup>3</sup> By the Statute of Uses, where a person is seised of land to the use of another, by reason of any bargain, sale, or feoffment, the person who has such use shall be deemed in lawful seisin, estate, and possession of the land, to all intents and purposes, in such like estate as he has in the use. This statute, as applied to a deed of bargain and sale, passes the legal estate, which for want of feoffment remained in the bargainor, to the purchaser, who by payment of the purchase-money was entitled to the equitable interest. Without the statute the bargainor was deemed to be seised of the land to the use of the bargainee; but the statute united the possession to the use, so that, the very instant the use is raised, the possession is joined to it, and the bargainee becomes seised of the land.<sup>4</sup> "The Statute

<sup>1</sup> 5 Bythewood & Jarman's Precedents in Conveyancing, 4th ed. 7.

<sup>2</sup> Act 4 & 5 Vict. ch. 21.

<sup>3</sup> French v. French, 3 N. H. 234, 260, per Richardson, C. J.

<sup>4</sup> French v. French, 3 N. H. 234; Dig-

by's Hist. of the Law of Real Prop. 4th ed. 328; 5 Bythewood & Jarman's Precedents in Conveyancing, 4th ed. 8; Slifer v. Beates, 9 S. & R. 166, 177, per Duncan, J.

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of Uses accordingly defeated its own ends, and enabled secret conveyances to be made with greater facility than before."

**201. Statute of Enrolments.**—The Statute of Uses having failed in its purpose, a second act was passed the same year to prevent the mischief of secret bargains and sales. This was the Statute of Enrolments, which required all bargains and sales of inheritance or freehold, which previously might be made by parol, to be made by deed indented, and that they should be enrolled in a court of record.<sup>1</sup> The intention was to secure publicity; but the statute failed of its purpose, because it applied only to estates of inheritance or freehold, and not to estates for years; and consequently, upon a bargain and sale for years, the use raised upon the consideration was immediately executed by the Statute of Uses, so that the purchaser having legal possession could receive the seisin by a mere release.<sup>2</sup> "Thus if A, tenant in fee simple, bargained and sold the manor of Dale to B for a year, and the day after executed a release of the reversion in fee to B and his heirs, he would by the bargain and sale have immediately vested in him an estate for a year in possession. He would thereupon become capable of taking a release, and, so soon as the release was executed, the smaller estate and the larger would coalesce, and the term be 'merged' or sunk in the larger estate, whereupon B would become tenant in fee simple in possession. So popular did this conveyance become that in ordinary cases it entirely superseded the feoffment, and bargain and sale enrolled, and became the general mode of conveying freeholds *inter vivos* till the year 1841."<sup>3</sup>

**202. The form of conveyance known as a covenant to stand seised is also founded upon the Statute of Uses.** The consideration is the distinctive and essential feature of this species of deed; the covenant can rest only in consideration of blood or marriage. It need not be expressed in any particular words, but this consideration must in some way appear as the actual consideration. Thus the deed need not in terms declare that it is made in consideration of natural love or affection for a wife, son, or cousin; but if there is a covenant to stand seised to

<sup>1</sup> 27 Henry VIII. ch. 16.

<sup>2</sup> 5 Bythewood's Precedents in Conveyancing, 4th ed. 8; Digby's Hist. of the Law of Real Property, 4th ed. 355, 364.

<sup>3</sup> Digby's Hist. of the Law of Real Property, 4th ed. 365. The English Statute 4 & 5 Vict. ch. 21 (1841) made a release an effectual conveyance.

the use of the wife, son, or cousin, the covenant raises the use and the statute executes it.<sup>1</sup>

203. Our ancestors brought with them, upon the first settlement of this country, the modes of conveying real estate then in use in England. Thus, a statute of the colony of Massachusetts, passed in 1652,<sup>2</sup> provided that "no sale or alienation of houses and lands, within this jurisdiction, shall be holden good in law, except the same be done by deed in writing, under hand and seal, and delivered, and possession given upon part in the name of the whole by the seller, or his attorney so authorized, under hand and seal, unless the said deed be acknowledged and recorded according to law." Here a feoffment is recognized as a valid mode of conveyance.

Deeds of bargain and sale were distinctly recognized in the laws of the same colony passed in 1641 and in 1697.<sup>3</sup>

In South Carolina, previous to the year 1795, a deed of lease and release was the usual form of conveyance. In that year an act was passed reciting that, whereas the mode of conveying land by lease and release is expensive and inconvenient, a form of release which is given shall be effectual to convey the fee simple of any real estate. The operative words in this form were "bargain, sell, and release," which combines the operative words of a deed of bargain and sale and of a deed of release.<sup>4</sup>

The principles of the Statute of Uses were a part of the common law adopted by the colonies.<sup>5</sup> The forms of conveyances then used, and in substance used down to the present time, have their foundation in this statute.

204. Conveyances of estates of inheritance or freehold in land, or of any interest in it more than for a short term of years, must be by deed in writing; and this is expressly declared by statute in many of the American States,<sup>6</sup> and is implied

<sup>1</sup> French v. French, 3 N. H. 234; Cook v. Brown, 34 N. H. 460.

<sup>2</sup> Col. Laws, ed. 1672, p. 32.

<sup>3</sup> Col. Laws, ed. 1672, p. 32; 1 Prov. Laws, 298. The latter was reenacted in New Hampshire, 13 Wm. III. ch. 12 (Prov. Laws, 19); French v. French, 3 N. H. 234.

<sup>4</sup> Craig v. Pinson, Cheves (S. C.), 272.

<sup>5</sup> Bryan v. Bradley, 16 Conn. 474.

<sup>6</sup> Alabama: Code 1886, § 1789. Arizona: R. S. 1887, ¶ 214. California: Civ. Code, § 1091. Connecticut: G. S. 1888, § 2954. Florida: R. S. 1892, § 1950. Georgia: Code 1882, § 2690. Idaho: R. S. 1887, § 2920. Illinois: R. S. 1889, ch. 39, § 1. Indiana: 2 R. S. 1894, § 3335. Kansas: G. S. 1889, § 1112. Kentucky: R. S. 1894, §§ 490, 2341. Maine: R. S. 1883, ch. 73, § 10. Maryland: Pub. G. L.



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by the statutory provisions of other States, especially the provisions for the recording of deeds.

**205.** Livery of seisin is not in any of the States necessary in any conveyance of land, and in most of the States it is declared by statute either that livery of seisin is not necessary; or that conveyances of any interest in land may be made by deed without any other act or ceremony; or that all deeds shall be held to vest the possession of the grantor in the grantee to the extent of the estate intended to be conveyed.<sup>1</sup>

**206.** In modern conveyancing the deed of bargain and sale is in fact the instrument of transfer almost exclusively in use, though the technical words originally used in other forms of conveyances are often joined with the appropriate words of a deed of bargain and sale. In fact, almost every deed made upon a pecuniary consideration is regarded as a deed of bargain and sale. Whatever may be the words used, if they import a present sale for a pecuniary consideration, and the deed cannot operate as a lease and release by reason that the grantee is not in possession, nor as a contract to stand seised to uses, because there is no consideration of blood or marriage, effect will be given to it as a bargain and sale.<sup>2</sup>

**207.** The words "bargain and sell" are not essential to a deed of bargain and sale. No technical words are required to raise a use. If the words used and the consideration paid create

1888, art. 21, § 1. **Massachusetts:** P. S. 1882, ch. 120, §§ 1, 3. **Michigan:** 2 Annot. Stats. 1882, § 5652. **Mississippi:** Annot. Code 1892, § 2433. **Missouri:** R. S. 1889, § 2395. **Nebraska:** Comp. Stats. 1893, ch. 73, §§ 1, 46. **North Dakota:** Comp. Laws 1877, § 3245. **Oklahoma:** R. S. 1893, § 1608. **Pennsylvania:** Brightly's Purdon's Dig. 1894, p. 942, § 2. **South Dakota:** Comp. Laws 1887, § 3245. **Texas:** R. Civ. Stats. 1889, art. 548. **Vermont:** R. S. 1880, §§ 1922, 1932. **Virginia:** Code 1887, § 2413. **Washington:** G. S. 1891, § 1422.

<sup>1</sup> **Alabama:** Code 1886, § 1841. **Arkansas:** Dig. of Stats. 1884, § 639. **Colorado:** Annot. Stats. 1891, § 428. **Delaware:** R. Code 1893, ch. 83, § 1. **Florida:** R. S. 1892, § 1954. **Illinois:** R. S. 1889, ch. 30, § 1. **Iowa:** R. S. 1888, 3099. **Kansas:**

G. S. 1889, ¶ 1112. **Kentucky:** R. S. 1894, § 491. **Maryland:** Pub. G. L. 1888, art. 21, § 23. **Massachusetts:** P. S. 1882, ch. 120, §§ 1, 3. **Michigan:** Annot. Stats. 1882, § 5652. **Minnesota:** G. S. 1894, § 4160. **Mississippi:** Annot. Code 1892, § 2433. **Missouri:** R. S. 1889, § 2395. **Montana:** Comp. Stats. 1887, p. 656, § 235. **Nevada:** G. S. 1885, § 2569. **New Hampshire:** P. S. 1891, ch. 137, § 1. **New York:** 2 R. S. 1889, p. 2451. **North Carolina:** Code 1883, § 1245. **Oregon:** Annot. Laws 1892, § 3002. **Rhode Island:** P. S. 1882, p. 443. **South Carolina:** G. S. 1882, § 1780. **Tennessee:** Code 1884, § 2811. **Wisconsin:** Annot. Stats. 1889, § 2203. **Wyoming:** R. S. 1887, § 1.

<sup>2</sup> *Lynch v. Livingston*, 8 Barb. 463; *Chiles v. Conley*, 2 Dana, 21.

a contract of sale, or bargain, a trust is instantly raised upon which the Statute of Uses operates. The statute performs the task of the ancient livery of seisin. Thus, the words "remise, release, and quitclaim" are sufficient to raise a trust or use for the benefit of the bargainee, which the statute transfers into possession.<sup>1</sup> The words "release and assign" have the same effect; and so the words "make over and confirm,"<sup>2</sup> or the words "make over and grant."<sup>3</sup>

**208.** The courts endeavor to give effect to the intent of the parties to a deed in some way. If it cannot operate as a bargain and sale for the reason that there was no pecuniary consideration expressed or paid, but there was a consideration of love, marriage, or natural love and affection, the deed will be given effect as a covenant to stand seised.<sup>4</sup> Moreover, a deed will be construed as a feoffment, with livery of seisin, or as a deed under the Statute of Uses, as will best accomplish the intention of the parties.<sup>5</sup>

**209.** A quitclaim deed, or in other words a deed of release, under the principles of the common law, never operated as a conveyance in a technical sense, but merely as an enlargement of the estate of the releasee if he was at the time in possession of the land, or had some estate to be enlarged, such as an estate for years.<sup>6</sup> In England it was not till 1841 that an act was passed "for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties."<sup>7</sup>

By statute in many States,<sup>8</sup> and by usage in others, a quitclaim deed, or deed of release, operates to pass all the estate the re-

<sup>1</sup> *Doe v. Salkeld*, Willes, 675; *Goodright v. Moss*, Cowp. 593; *Jackson v. Fisk*, 10 Johns. 456; *Lynch v. Livingston*, 8 Barb. 463.

<sup>2</sup> *Jackson v. Root*, 18 Johns. 60, 79.

<sup>3</sup> *Jackson v. Alexander*, 3 Johns. 484.

<sup>4</sup> *Eckman v. Eckman*, 68 Pa. St. 460; *Bryan v. Bradley*, 16 Conn. 474; *Cheney v. Watkins*, 1 Har. & J. 527, 2 Am. Dec. 530.

<sup>5</sup> *Eckman v. Eckman*, 68 Pa. St. 460.

<sup>6</sup> *Porter v. Perkins*, 5 Mass. 233, 4 Am. Dec. 52; *McConnel v. Reed*, 5 Ill. 117; *Kerr v. Freeman*, 33 Miss. 292.

<sup>7</sup> 4 & 5 Vict. ch. 11.

<sup>8</sup> *Illinois*: R. S. 1889, ch. 30, § 10; *McConnel v. Reed*, 5 Ill. 117. *Indiana*: R. S. 1894, § 3343. *Kansas*: G. S. 1889, ¶ 1111. *Kentucky*: G. S. 1894, § 492. *Maine*: R. S. 1883, ch. 73, § 14. *Massachusetts*: P. S. 1882, ch. 120, § 2. *Michigan*: 2 Annot. Stats. 1882, § 5652. *Minnesota*: G. S. 1894, § 4163; *Everest v. Ferris*, 16 Minn. 26. *Mississippi*: Annot. Code 1892, § 2438; *Kerr v. Freeman*, 33 Miss. 292; *Chapman v. Sims*, 53 Miss. 154. *Oregon*: G. L. 1892, § 3004. *Virginia*: Code 1887, § 2427. *West Virginia*: Code 1891, ch. 72, § 3. *Wisconsin*: Annot. Stats. 1889, § 2207. *Wyoming*: R. S. 1887, § 3.

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lessor could convey by a deed of bargain and sale, or by any other form of deed.

210. There has long been a tendency towards brevity and simplicity in the forms of deeds. In theory at least, a good deed might be made in a very few words so long ago as the time of Sir Edward Coke; "for," he said, "if a man by deed give land to another and to his heirs without more saying, this is good, if he put his seal to the deed, deliver it, and make livery accordingly." Not merely in theory, but in practice, the American States are returning to the simplicity of the Anglo-Saxons, who, "in their deeds, observed no set form, but used honest and perspicuous words to express the things intended with all brevity, yet not wanting the essential parts of the deed, as the names of the donor and donee; the consideration; the certainty of the thing given; the limitation of the estate; the reservation; and the names of the witnesses."<sup>1</sup> Some of the statutory forms of deeds now in use would have satisfied the Anglo-Saxons as regards brevity.<sup>2</sup> It is probable that statutory forms of deeds will come into general use.

Aside from statutory enactments, however concise and informal an instrument may be, it will operate as a deed if it has the substantial requisites of a deed,—that it identifies the parties and the property, contains words of grant or transfer, and is executed as a deed is required to be.<sup>3</sup>

211. A deed by indenture is one executed by two or more parties. This is the more usual form of deed both in England and in this country. It commences with the words, "This indenture," and then follow a statement of the date, the names and descrip-

<sup>1</sup> Sir Henry Spellman's Works, by Bishop Gibson, p. 234. 1882, §§ 5729, 5730. *Mississippi*: Annot. Code 1892, § 2479. *Missouri*: R. S. 1889, p. 2251. *New York*: Laws 1890, ch. 475.

<sup>2</sup> There are statutory forms of deeds in the following States, many of them in very brief terms:—  
*Arizona* T.: R. S. 1887, § 218. *Arkansas*: Dig. of Stats. 1884, p. 1288. *California*: Civ. Code, § 1092. *Colorado*: Laws 1887, p. 226. *Florida*: Laws 1891, § 4038. *Illinois*: R. S. 1889, ch. 30, §§ 9-11. *Indiana*: R. S. 1894, § 3346-3349. *Iowa*: R. S. 1888, § 3145. *Kansas*: G. S. 1889, §§ 1110, 1111. *Maryland*: Pub. G. L. 1883, art. 21, §§ 51-59. *Michigan*: G. S. 1882, §§ 5729, 5730. *Mississippi*: Annot. Code 1892, § 2479. *Missouri*: R. S. 1889, p. 2251. *New York*: Laws 1890, ch. 475. *Oklahoma* T.: Comp. Stats. 1893, §§ 1609, 6094. *South Carolina*: G. S. 1892, § 1775. *South Dakota*: Comp. Laws 1887, §§ 3247, 3249. *Tennessee*: Code 1884, § 2820. *Texas*: R. S. 1879, art. 552; R. Civ. Stats. 1889, § 552. *Utah*: Laws 1890, ch. 57. *Virginia*: Code 1887, ch. 108, §§ 2437-2452. *Washington*: G. S. 1891, § 1424. *West Virginia*: Code 1891, ch. 72, § 1. *Wisconsin*: Annot. Stats. 1889, § 2208.

<sup>3</sup> *Chiles v. Conley*, 2 Dana (Ky.), 21.

tion of the parties, the recitals, the consideration, the operative words, the parcels, the habendum, the covenants, and at the close the testimonium clause, which refers to the date of the instrument stated at the beginning.<sup>1</sup>

A deed by indenture is the deed not only of the grantor, who alone executes it, but also of the grantee, to whom the conveyance is made, although it be not sealed and delivered by him.<sup>2</sup>

212. A deed poll is a deed made by one party only. If it contains no recitals, the introductory words are, "Know all men by these presents," etc. If there are recitals, the introductory words should be, "To all to whom these presents shall come" the grantor "sends greeting," followed by the recitals, which are introduced by "whereas."<sup>3</sup>

<sup>1</sup> "Indenture" means an indented deed. It was the custom to make two copies of the deed upon the same roll of parchment, which was then cut in a waving or "indented" line; and sometimes the cut was made through a word written across the parchment. The two parts of the parchment could be identified by putting the cut edges together and seeing whether they conformed. In recent times the instrument need not be actually indented,

though formerly this appears to have been considered necessary. The authorities, however, did not sustain the opinion that actual indenture was necessary.

In a deed poll there was no occasion for more than one copy, and the parchment was cut straight, or "polled."

<sup>2</sup> *Woodruff v. Woodruff* (N. J.), 16 Atl. Rep. 4.

<sup>3</sup> *Bythewood's Precedents*, 4th ed. p. 24.

## CHAPTER XIV.

### PARTIES TO DEEDS AND THEIR DESCRIPTION.

I. Names and descriptions of the grantors, 213-221.	III. Corporations and associations as grantees, 235-243.
II. Names and descriptions of the grantees, 222-234.	IV. Partnerships as grantees, 244, 245.

#### *Names and Descriptions of the Grantors.*

213. The deed should describe with sufficient clearness who is the grantor and who is the grantee, giving their names, places of residence, occupation or profession, and such other descriptions as are usually stated in deeds. "And regularly it is requisite," says Coke, "that the purchaser be named by the name of baptism and his surname, and that special heed be taken to the name of baptism; for that a man cannot have two names of baptism as he may have divers surnames."<sup>1</sup> A formal statement of the names, residences, and other description of the parties is not essential to the validity of a deed. But it has been sanctioned by usage for so long a period, and is so desirable, that great suspicion attends a deed which does not conform to usage in this particular. The office of a name is to identify a person; but identification may be made by any other description which points him out and distinguishes him from others. "Know," says Perkins, "that the name of the grantor is not put in the deed to any other intent but to make certainty of the grantor."<sup>2</sup>

A description of a party to a deed by name, residence, and occupation only furnishes the means of identification. That is all that any description can do. It does not in itself identify the party. It affords a presumption, which is ordinarily all that is

<sup>1</sup> Co. Litt. 3 a.; *Jackson v. Hart*, 12 Johns. 77, 87, 7 Am. Dec. 280, per Thompson, C. J. The importance formerly attached to the Christian name, as compared with the surname, is shown by the statement of Chief Justice Popbam that "the

law is not precise in the case of surnames, but for the Christian name this ought always to be perfect." *Britton v. Wrightman*, Poph. 56.

<sup>2</sup> Profitable Book, § 36.

required.<sup>1</sup> If a conveyance is made to one by a certain name, and afterwards there is a conveyance by one under the same name of the same land, there is a presumption of identity which is not overcome by the statement of a different place of residence in the two deeds. Thus land was conveyed to "Ashbel Green, of New York," and subsequently it was conveyed by Ashbel Green, of the township of Palisades, in the county of Bergen and State of New Jersey; and it was held that, notwithstanding the variance, such grantee and grantor would be presumed to be the same person.<sup>2</sup> The proximity or remoteness of the places of residence might have a bearing upon the presumption of identity.

214. Similarity of name is ordinarily sufficient evidence of identity of a purchaser in a chain of title, in absence of evidence casting doubt upon his identity.<sup>3</sup> Thus, where a grant was made to "Asahel Savary," who conveyed the land by an instrument reciting that it is made by "A. Savary," but signed it "A. Savary," and this instrument is shown to have come from the proper custody, the evidence of identity is sufficient to support a finding that the conveyance was executed by the original grantee.<sup>4</sup> And so where a patent was issued to "James Emmonds" and a deed of the land was made in which the grantor's name was so given, but it was signed "James Emmens," it was held that there was no such variance as to destroy the presumption that it was the deed of the patentee.<sup>5</sup>

Though the name written in a deed is not the same as the name signed to it, the variance in orthography or in sound may be so slight as not to destroy the presumption that they are intended for the same person.<sup>6</sup> A deed describing the grantor by his first given name written in full, with an initial for his middle name, but signed by an initial for the first name with the middle name written in full, sufficiently identifies the grantor, where the certifi-

<sup>1</sup> *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. Rep. 1077, per Elliott, C. J.; *Rupert v. Penner*, 35 Neb. 587, 53 N. W. Rep. 598; *Eames v. McGregor*, 43 Mich. 313, 5 N. E. Rep. 408; *Goodell v. Hibbard*, 32 Mich. 47.

<sup>2</sup> *Tillotson v. Webber*, 96 Mich. 144, 55 N. W. Rep. 837.

<sup>3</sup> *Chamblee v. Tarbox*, 27 Tex. 139, 144, 84 Am. Dec. 614; *Robertson v. Du Bose*, 76 Tex. 1, 6, 13 S. W. Rep. 300; *Jackson*

*v. Cody*, 9 Cow. 140; *Lyon v. Kain*, 36 Ill. 362; *O'Meara v. North American M. Co.* 2 Nev. 112, 121.

<sup>4</sup> *Smith v. Gillum*, 80 Tex. 120, 15 S. W. Rep. 794.

<sup>5</sup> *Lyon v. Kain*, 36 Ill. 362.

<sup>6</sup> *Lyon v. Kain*, 36 Ill. 362; *Dodd v. Bartholomew*, 44 Ohio St. 171; *Galveston &c. Ry. Co. v. Stealey*, 66 Tex. 468, 1 S. W. Rep. 186.

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cate of acknowledgment states that the officer knows the person signing the deed to be the same described in it, and who executed it.<sup>1</sup>

Where an error occurs in the name or residence of a party to a written instrument apparent upon its face, and from its contents susceptible of correction so as to identify the party with certainty, such error does not affect the validity of the instrument.<sup>2</sup> Thus where a deed was signed and acknowledged by "Samuel S. Jenkins," the fact that in one part of the deed the grantor's name was written "Samuel S. Jones" is a manifest error which does not affect the validity of the deed.<sup>3</sup>

215. If the name under which one has purchased land is not the correct name, nor idem sonans, and he conveys by his correct name, his identity as purchaser may be proved; but until such proof is made, and the deed to him is reformed, his deed is not a sufficient compliance with an agreement to give a "good and perfect title." Thus it appeared in a chain of title that a conveyance was made to "K. F. Redmond," and that thereafter one "K. F. Redman" conveyed the land; and after this said Redman executed another deed to the same grantee, in which he recited that he derived title to the land under the name of "K. F. Redmond," that his name was erroneously written "Redmond," and that he was the identical person to whom such conveyance was in fact made under such erroneous name. It was held that these deeds were not sufficient to make a good and perfect title under an agreement to convey. The court said: "The second deed from Redman, in which he recites that he is the identical person named as 'Redmond' in the prior conveyances, does not help the matter. These recitals may be true in point of fact, and upon being established by proof in a proper action, the defendant could doubtless be able to obtain a judgment reforming the deeds under which his grantor Redman claimed, and which judgment would in effect give him a 'good and perfect title' to the land, within the meaning of the law and the agreement which he made with the plaintiff. But a good and perfect title is one which is not only good in point of fact, but it must also be appar-

<sup>1</sup> *Lyon v. Kain*, 36 Ill. 362.

<sup>3</sup> *Jenkins v. Jenkins*, 148 Pa. St. 216,

<sup>2</sup> *Jones on Mort.* § 63; *Dodd v. Bar-* 23 Atl. Rep. 985.  
*tholomew*, 44 Ohio St. 171; *Stewart v.*  
*Sutherland*, 93 Cal. 270, 28 Pac. Rep. 947.

ently perfect when exhibited, that is, free from any reasonable objection. It is not sufficient that it can be shown to be good as the result of an action instituted for the purpose of reforming defects existing in any deed which is necessary to make the chain of title complete."<sup>1</sup>

**216.** For the purposes of identification, recitals in deeds as to facts of birth, marriage, and death are admissible as original evidence.<sup>2</sup> A deed of a land certificate which had been the community property of one August Auerbach and his wife Louisa, who after the death of her husband married one "Antone Hammer," was signed by "A. Hammer" and Louisa Hammer. The deed gave the grantors' names as "Andreas Hammer and Louisa Hammer," but recited that the certificate conveyed was "the headright of August Auerbach, first husband of Louisa Hammer." It was held that the deed was admissible in evidence in an action to try the title, and it was for the jury to say whether the Louisa Hammer who executed it as the wife of Andreas Hammer was the same person as the Louisa Auerbach who married Antone Hammer. The identity is indicated by the recital in the deed.<sup>3</sup>

**217.** A grantor may be identified by the certificate of acknowledgment.<sup>4</sup> Thus where in the body of a deed the grantor was described as "Robert P. McClintock," and the deed was signed "R. Parker McClintock," and the certificate of acknowledgment shows that Robert P. McClintock acknowledged the deed, it was held that the grantor was sufficiently identified.<sup>5</sup> Where the grantor's true name was recited in the body of the deed, and he acknowledged by his true name, the fact that he

<sup>1</sup> *Peckham v. Stewart*, 97 Cal. 147, 153, 31 Pac. Rep. 928. A perfect title is one that is free from apparent defects and is fairly deducible from the records. It is one that does not require litigation to establish it. *Richmond v. Gray*, 3 Allen, 25; *Turner v. McDonald*, 76 Cal. 177, 18 Pac. Rep. 262; *Sheehy v. Miles*, 93 Cal. 288, 28 Pac. Rep. 1046; *Tillotson v. Gesner*, 33 N. J. Eq. 313, 327.

<sup>2</sup> 1 *Greenleaf's Ev.* § 104; *Auerbach v. Wylie*, 84 Tex. 615, 19 S. W. Rep. 856; *Russell v. Oliver*, 78 Tex. 11, 16, 14 S. W. Rep. 264; *Chamblee v. Tarbox*, 27 Tex. 139, 145, 84 Am. Dec. 614.

<sup>3</sup> *Auerbach v. Wylie*, 84 Tex. 615, 19 S. W. Rep. 856.

<sup>4</sup> *Lyon v. Kain*, 36 Ill. 362; *Boothroyd v. Engles*, 23 Mich. 19; *Houx v. Batteen*, 68 Mo. 84; *Fenton v. Perkins*, 3 Mo. 144; *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. Rep. 734, 17 S. W. Rep. 393.

<sup>5</sup> *Grand Tower Co. v. Gill*, 111 Ill. 541; *Jenkins v. Jenkins*, 148 Pa. St. 216, 23 Atl. Rep. 985. The affidavit of the subscribing witness has the same effect. *Bennett v. Green*, 74 Cal. 425, 16 Pac. Rep. 231.



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signed by the Christian name of "Edmund" when his true name was "Edward" was held not to invalidate the conveyance. It is to be presumed from the certificate of acknowledgment, in the absence of the deed itself, that the deed was in fact executed by "Edward."<sup>1</sup>

In the body of a deed and in the certificate of acknowledgment the grantor was correctly described as "Archibald T. Finn." The deed was signed by "Arch. T. Finn." The officer taking the acknowledgment certified that "personally came Archibald T. Finn, personally to me known to be the identical person whose name is affixed to the above deed as grantor, and acknowledged the instrument to be his voluntary act and deed." This was sufficient to show that the grantor described in the deed and the person who signed and acknowledged the instrument were one and the same person.<sup>2</sup>

The name of the grantor in the body of the deed and in the acknowledgment may be so unlike that signed to the deed that the certificate of acknowledgment will not be held to sufficiently identify the grantor. If the name signed to a deed and the name by which it was acknowledged are not similar, proof should be made that the person who signed the deed also acknowledged it. Thus a deed purporting to be signed by "Harmon Sherman," and acknowledged by "Hiram Sherman," cannot in the absence of such proof be received in evidence as the deed of Hiram Sherman, the original deed not being shown. In the absence of proof, such a deed is signed and acknowledged by different persons.<sup>3</sup> And so where a deed and the acknowledgment described the grantor as "R. P. O'Neil," and the signature was the same, it was held that the deed was not admissible in evidence to show a conveyance from "Patrick O'Neil" without evidence of identity; and without such proof it would not be presumed that "R. P. O'Neil" stood for "Rev. Patrick O'Neil."<sup>4</sup>

**218. The owner of land may convey it by any name which he may use as a signature, and the title will pass to his grantee, though he received the title under a different name.<sup>5</sup>** "If a man

<sup>1</sup> *Middleton v. Findla*, 25 Cal. 76; *Nixon v. Cobleigh*, 52 Ill. 387; *Lyon v. Kain*, 36 Ill. 362.

<sup>2</sup> *Rupert v. Penner*, 35 Neb. 587, 53 N. W. Rep. 598.

<sup>3</sup> *Boothroyd v. Engles*, 23 Mich. 19. See *O'Meara v. North American M. Co.* 2 Nev. 112, 121.

<sup>4</sup> *Burford v. McCue*, 53 Pa. St. 427.

<sup>5</sup> *Addis v. Power*, 7 Bing. 455; *Wil-*

be baptized by one name and known by another, a grant by the name by which he is known shall be good.”<sup>1</sup> Whether one purposely uses an assumed name, or the scrivener has made a mistake in writing his name, the deed of the true owner of the land is effectual to pass the title. “If the true owner conveys by any name, the conveyance as between the grantor and grantee will transfer title, and in all cases evidence *aliunde* the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument, or add new terms to it, but merely fixes and applies the terms already contained in it.”<sup>2</sup> Though the name used by the grantor throughout the deed and in his signature is wholly fictitious, he is bound by the deed, and the title passes to the grantee.<sup>3</sup>

Though the grantor's name be incorrectly given throughout a deed, and it be executed by his signing his correct name, the deed is good.<sup>4</sup> He is estopped from denying that he is bound by the deed.<sup>5</sup> On the other hand, if the grantor signs a deed by his Christian name only, his name in full appearing in the body of the deed, the signing is sufficient and binding.<sup>6</sup> A description of the grantor as the wife of a person named is sufficient, though it is afterwards shown that the marriage ceremony was invalid.<sup>7</sup>

219. The middle name or initial of a person is not a part of his legal name, which consists of one given name and one

*liams v. Bryant*, 5 Mees. & W. 447, 454; *Shaw v. Hunt*, 8 Taunt. 645; *Elliot v. Davis*, 2 Bos. & Pul. 338; *Garwood v. Hastings*, 38 Cal. 216; *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347, where a deed made to “Darby O’Fallon,” which was the name under which Jeremiah Fallon sometimes passed, was held to be a good deed, and a conveyance by him under the name of “Darby O’Fallon” transferred the title. A somewhat similar ruling was made in *Middleton v. Findla*, 25 Cal. 76, and in *Nixon v. Cobleigh*, 52 Ill. 387; *Wilson v. White*, 84 Cal. 239, 24 Pac. Rep. 114; *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. Rep. 788, where a deed was made out in the name of “James O. Brunius,” and signed “J. O. Brunius.” It was held that parol evi-

dence was admissible to show that John O. Brunius was the party who signed the deed, and that if this was proved his title passed.

<sup>1</sup> Lord Chief Baron Comyns in his Digest, Fait, E. 3.

<sup>2</sup> *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. Rep. 788.

<sup>3</sup> *David v. Williamsburgh Ins. Co.* 83 N. Y. 265, 38 Am. Rep. 418; *Andrews v. Dyer*, 81 Me. 104, 16 Atl. Rep. 405; *Hommel v. Devinney*, 39 Mich. 522; *Nixon v. Cobleigh*, 52 Ill. 387.

<sup>4</sup> *Jones v. Whitbread*, 11 C. B. 406, 413.

<sup>5</sup> *Boothroyd v. Engles*, 23 Mich. 19.

<sup>6</sup> *Zann v. Haller*, 71 Ind. 136.

<sup>7</sup> *Boughton v. Sandilands*, 3 Taunt. 342.

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surname.<sup>1</sup> It follows, therefore, that the omission of such middle name or initial, or the insertion of a wrong middle name or initial, in a deed does not affect its legal validity, whatever confusion or uncertainty may be thereby occasioned.<sup>2</sup> It is competent to show that the grantor or grantee is as well known without a middle name as with one.<sup>3</sup> The deeds themselves may sufficiently identify the party though the middle name or initial be omitted in one instance. Thus, where a deed was made to "Harriet N. Andrews," and the next deed in the chain of title was executed by "Harriet Andrews" and her husband, but in the body of the deed she was described by the same name as in the deed to her, and as residing in the same town, the identity was regarded as sufficiently established.<sup>4</sup>

If the deed does not sufficiently show the identity of the party, this may be proved by testimony that he executed the deed, or was the grantee to whom the deed was delivered. Thus, where in a chain of title it appeared that a conveyance was made to "E. J. Courtright," and that subsequently Courtright conveyed by a deed in the body of which his name was given as "Erastus J. Courtright," but it was signed "Erastus I. Courtright," it was held to be competent to identify the grantor by his testimony and that of the grantee that the Courtright who executed the deed was the same person to whom the deed was made under the name of "E. J. Courtright."<sup>5</sup>

One David A. Brown purchased a lot, taking a deed in the name of David C. Brown. He executed a bond and mortgage in the name of David C. Brown to secure the purchase-money, and the notary certified that the mortgage was acknowledged by David C. Brown. He had at the time an infant son named David C. Brown. It was held that the deed and mortgage must be construed together, and it was the evident understanding of the

<sup>1</sup> *Games v. Stiles*, 14 Pet. 322; *Dunn v. Games*, 1 McLean, 321; *Franklin v. Tulmudge*, 5 Johns. 84; *Erskine v. Davis*, 25 Ill. 251; *Roosevelt v. Gardinier*, 2 Cow. 463; *McDonald v. Morgan*, 27 Tex. 503; *Banks v. Lee*, 73 Ga. 25.

<sup>2</sup> *Coke v. Brummell*, 2 Moo. 495; *Schofield v. Jennings*, 68 Ind. 232; *Nicodemus v. Young (Iowa)*, 57 N. W. Rep. 906; *Erskine v. Davis*, 25 Ill. 251; *Peabody v. Brown*, 10 Gray, 45.

<sup>3</sup> *Gillespie v. Rogers*, 146 Mass. 610, 16 N. E. Rep. 711; *Games v. Stiles*, 14 Pet. 322, 327; *Hall v. Leonard*, 1 Pick. 27, 30; *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344; *Peabody v. Brown*, 10 Gray, 45.

<sup>4</sup> *Clow v. Plummer*, 85 Mich. 550, 48 N. W. Rep. 795.

<sup>5</sup> *Nicodemus v. Young (Iowa)*, 57 N. W. Rep. 906.

grantor that the grantee and mortgagor were one and the same person, and the title did not pass to his son by the deed.<sup>1</sup>

220. But in recent years the middle name, or its initial, is apt to be regarded as a material part of a name. The use of such initials, in addition to a fully written Christian name, is the most common means by which, in all the affairs of life, persons bearing names otherwise the same are distinguished; and if it appear merely that land had been conveyed to "William H. Brown," and that a subsequent conveyance of the same land had been executed by "William B. Brown," it will not be presumed that the grantee in the one deed and the grantor in the other were the same person.<sup>2</sup>

The rule that the middle name or initial is not a material part of a person's name does not apply when the first name is not given, but only its initial.<sup>3</sup>

221. The designation of "junior" or "second" is no part of a man's name, and, although convenient and desirable for the purpose of distinguishing the party from another person of the same name, it is not essential, and the person intended may be shown in some other way. "Neither of the terms constitutes any part of the name, but they are used to describe and designate the person, as his residence is sometimes used for the same purpose."<sup>4</sup>

## II. *Names and Descriptions of the Grantees.*

222. In every grant there must be a grantee. If no grantee is named or described in the deed no title passes by it to any one. Parol testimony that one of the persons named in the deed as a grantor was the intended grantee is inadmissible when there is nothing in the deed to indicate that such grantor was not just what he was stated to be, save the bare fact that he did not join in its execution, and that a grantee was not named therein. That the name of the intended grantee is indorsed upon the deed is of no consequence. The grantee must be determined from the con-

<sup>1</sup> McDuffie v. Clark, 9 N. Y. Supp. 826.

<sup>2</sup> Ambs v. Chicago, St. P., Minn. & Omaha Ry Co. 44 Minn. 266, 46 N. W. Rep. 321.

<sup>3</sup> State v. Higgins (Minn.), 61 N. W. Rep. 816.

<sup>4</sup> Cobb v. Lucas, 15 Pick. 7, per Morton, J.; Kincaid v. Howe, 10 Mass. 203; Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232; Fleet v. Youngs, 11 Wend. 522. See Sawyer v. Northan, 112 N. C.

261, 16 S. E. Rep. 1023.

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tents of the instrument, not from its label. Parol evidence is inadmissible that another person named as grantor was the sole owner of the property described; that he bargained it to the other person named as grantor; that it was the intention of the owner to convey to such other person; and that a mistake was made by the person who drew the deed. Title to real property cannot be established by parol.<sup>1</sup>

The fact that one is named in the consideration clause does not make him a grantee. Thus, where a deed acknowledged the receipt of consideration from two persons, and the granting clause and habendum contained the name of one of them only, with a blank apparently left for the insertion of another name, it was held that the deed conveyed no interest to the person whose name appeared only in the consideration clause.<sup>2</sup>

223. The grantee must be in existence and capable of taking at the time of the grant.<sup>3</sup> This was essential at common law, because otherwise there could be no livery of seisin. A grantee is as necessary to the validity of a grant as that there should be a grantor or a thing granted.<sup>4</sup> Thus a conveyance to such children as may afterwards be born to persons named is inoperative, and vests no title in after-born children of such persons.<sup>5</sup>

A deed to a person not living at the time of its execution and his heirs is void, there being no person to take under it, as the word "heirs" is a word of limitation and not of purchase.<sup>6</sup> But a deed to a person named or his heirs is not void, for it is a conveyance to such person if living, and, if he is not living, to his heirs. It is a deed in the alternative.<sup>7</sup> A deed to the heirs of a person deceased is valid, because the persons entitled to take can be ascertained by parol evidence.<sup>8</sup>

There must be parties capable of contracting with each other.

<sup>1</sup> *Allen v. Allen*, 48 Minn. 462, 51 N. W. Rep. 473; *Whitaker v. Miller*, 83 Ill. 381; *Garnett v. Garnett*, 7 T. B. Mon. 545.

<sup>2</sup> *Hardin v. Hardin*, 32 S. C. 599, 11 S. E. Rep. 102.

<sup>3</sup> *Douthitt v. Stinson*, 63 Mo. 268; *Chase v. Palmer*, 29 Ill. 306; *Simms v. Hervey*, 19 Iowa, 273; *Kelley v. Bourne*, 15 Oreg. 476, 16 Pac. Rep. 40; *Sloane v. McConahy*, 4 Ohio, 157, 169.

<sup>4</sup> *Allen v. Allen*, 48 Minn. 462, 51 N.

<sup>5</sup> *Shep. Touch.* 235; *Lillard v. Ruckers*, 9 Yerg. 64.

<sup>6</sup> *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543.

<sup>7</sup> *Ready v. Kearsley*, 14 Mich. 215.

<sup>8</sup> *Boone v. Moore*, 14 Mo. 420; *Shaw v. Loud*, 12 Mass. 447.

A grantor cannot make a conveyance to himself, though he claims to act in a representative capacity in taking it. Thus, where an administrator with will annexed, having appropriated funds belonging to the estate, made a mortgage to himself as administrator to secure his indebtedness, the mortgage was declared inoperative. Though the mortgage was made to himself, with the addition of the words "executor of the estate" named, the legal effect of the mortgage was a grant to himself in his individual capacity.<sup>1</sup>

The word "administrator," "executor," or "trustee" after the name of a grantee in a deed is merely a description of the person, and a conveyance to a person so described vests in him in his individual capacity.<sup>2</sup>

**224.** It is not essential that the grantee should be formally named in the granting part of a deed. It is only necessary that, taking the whole instrument together, there is no uncertainty as to the grantee.<sup>3</sup> "The whole writing is always to be considered, and the intent will not be defeated by false English or irregular arrangement, unless the defect is so serious as absolutely to preclude the ascertainment of the meaning of the parties through the means furnished by the whole document, and such intrinsic aids as the law permits. It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If the instrument shows who he is, if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee, it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument."<sup>4</sup>

But a mere recital, in a deed of indenture, of the name of a person as one of the parties of the second part, who is not afterwards named in the deed, is not sufficient to make such person one of the grantees. Thus, where it appeared that John Hartman and Susan, his wife, were named as parties of the second part in a

<sup>1</sup> *Gorham v. Meacham*, 63 Vt. 231, 22 Atl. Rep. 572.

<sup>2</sup> *Jackson v. Roberts* (Ky.), 25 S. W. Rep. 879; *Towar v. Hale*, 46 Barb. 361; *Austin v. Shaw*, 10 Allen, 552; *Brown v. Combs*, 29 N. J. L. 36.

<sup>3</sup> *American Emigrant Co. v. Clark*, 62 Iowa, 182, 17 N. W. Rep. 483; *Bay v. Posner* (Md.), 26 Atl. Rep. 1084.

<sup>4</sup> *Newton v. McKay*, 29 Mich. 1, per *Graves, C. J.*

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deed of indenture, but in all the granting and operative clauses of the deed the conveyance was to John Hartman, his heirs and assigns, alone, and the covenants were with him alone, and the name of Susan Hartman did not otherwise appear in the deed, it was held that the conveyance was to the husband alone, and not to the husband and wife jointly. It was claimed that the intention was to make a conveyance to them jointly, that by a mistake of the scrivener the name of the wife was omitted from the granting and operative clauses of the deed, and that the deed should be reformed so as to make it conform to such intention. Testimony was introduced that all the parties intended that the conveyance should be to the husband and wife jointly. It was held that the evidence was not sufficient to establish such intention beyond a reasonable doubt.<sup>1</sup>

225. It is not absolutely necessary that the grantee be named at all, provided he is so described that he can be clearly ascertained.<sup>2</sup> Thus a deed made to the eldest or other designated son of a person named, or to all the sons of such person, is good;<sup>3</sup> or to all the creditors of the grantor;<sup>4</sup> or to the heirs of a named deceased person;<sup>5</sup> or to the children of a person named;<sup>6</sup> or to the wife of a person named;<sup>7</sup> or to the son, though a bastard, of his reputed father, when he has acquired the reputation of being his son.<sup>8</sup>

226. Parol evidence is admissible to identify the grantee. When a person produces a deed having the name of the grantee identical with his own, there is *prima facie* evidence of the delivery of the deed to him as grantee.<sup>9</sup> But if the name of the grantee in the deed and the name of the person producing it and claiming to be the grantee are unlike, evidence of identification of the grantee and of delivery of the deed to him is necessary. This identification may be made by parol evidence. Thus it

<sup>1</sup> National Bank v. Hartman (Pa. St.), 30 W. N. C. 42, 23 Atl. Rep. 842.

<sup>2</sup> Shep. Touch. 232, 236; Reeves v. Watts, 7 Best & S. 523; Maugham v. Sharpe, 17 C. B. N. S. 443; Gillespie v. Rogers, 146 Mass. 610, 16 N. E. Rep. 711; Shaw v. Loud, 12 Mass. 447; Webb v. Den, 17 How. 576.

<sup>3</sup> Co. Litt. 3 b.

<sup>4</sup> Reeves v. Watts, L. R. 1 Q. B. 412; Gresty v. Gibson, L. R. 1 Ex. 112; Mc-

Laren v. Baxter, L. R. 2 C. P. 559; Isaacs v. Green, L. R. 2 Exch. 352.

<sup>5</sup> Shaw v. Loud, 12 Mass. 447; Jones v. Morris, 61 Ala. 518; Payne v. Mathis, 92 Ala. 585, 9 So. Rep. 605; McKee v. Spiro, 107 Mo. 452, 17 S. W. Rep. 1013; Boone v. Moore, 14 Mo. 420.

<sup>6</sup> Hogg v. Odom, Dudley (Ga.), 185.

<sup>7</sup> Dr. Ayray's Case, 11 Coke, 21 a.

<sup>8</sup> Finch's Case, 6 Coke, 63 a.

<sup>9</sup> Dunlap v. Green, 60 Fed. Rep. 242.

may be shown that the name written in the deed was erroneous by mistake, but was intended for the person to whom it was delivered.<sup>1</sup>

227. Parol evidence is not admissible, however, to show that the deed was made and delivered by mistake to the wrong person, and that the grantor intended another person as grantee.<sup>2</sup> Such evidence is admissible only to show that the person named in the deed was the person intended to be the grantee.<sup>3</sup>

If a deed is made to one by his surname only, his Christian name being left blank, there is an ambiguity as to the grantee which may be remedied by proof *aliunde* showing to whom the deed was delivered, or intended to be delivered. Where the grantee in such a deed, for the purpose of defrauding his creditors, without the knowledge of his wife filled the blank with her Christian name, it was held that the title vested in the husband, and was not divested by his filling the blank with the name of his wife.<sup>4</sup>

The ground for the admission of parol evidence, to determine who is the grantee to whom a deed is made, is well stated by Chief Justice Royce of the Supreme Court of Vermont.<sup>5</sup> "There is," he says, "an important difference between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable, on that account, of different applications. To correct the one is, in effect, to add new terms to the instru-

<sup>1</sup> *Andrews v. Dyer*, 81 Me. 104, 16 Atl. Rep. 405, 78 Me. 427, 6 Atl. Rep. 833. The deed in this case was made to "Mercy A. Andrews," instead of "Melissa A. Andrews," to whom it was delivered and for whom it was intended. *Jacobs v. Benson*, 39 Me. 132, 63 Am. Dec. 609; *Hall v. Leonard*, 1 Pick. (Mass.) 27; *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344; *Skinker v. Haagsma*, 99 Mo. 208, 12 S. W. Rep. 659; *Staak v. Sigelkow*, 12 Wis. 234; *Nicodemus v. Young* (Iowa), 57 N. W. Rep. 906; *Peabody v. Brown*, 10 Gray, 45, where a deed to "Hiram Gowing, cordwainer," was shown to have been intended for "Hiram G. Gowing," and not for "Hiram Gowing," his young son; *Jackson v. Stanley*, 10 Johns. 133, where the mistake was in the Christian name;

*Jackson v. Hart*, 12 Johns. 77, where the mistake was in the surname.

<sup>2</sup> *Crawford v. Spencer*, 8 Cush. 418; *Whitmore v. Learned*, 70 Me. 276. See *Diener v. Diener*, 5 Wis. 483.

<sup>3</sup> *Andrews v. Dyer*, 81 Me. 104, 16 Atl. Rep. 405; *Jackson v. Stanley*, 10 Johns. 133.

<sup>4</sup> *Fletcher v. Mansur*, 5 Ind. 267. A different conclusion was reached in *Jennings v. Jennings*, 24 Oreg. 447, 34 Pac. Rep. 21, where, a deed having been executed and delivered to one who was entitled to receive it, he filled the blank with the name of his daughter, and delivered the deed to her, and it was held that this was sufficient to convey the title to her as against him and his heirs.

<sup>5</sup> *Morse v. Carpenter*, 19 Vt. 613, 616.



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ment; while to complete the other is only to ascertain and fix the application of terms already contained in it. Indeed, the most usual and approved description of the grantee — that which gives his Christian and surname and the town in which he lives — may prove to be imperfect, as others bearing both those names may be living in the same town. And if the Christian name or place of residence be omitted, the description is only rendered the more imperfect; it is less certain than it might be, and usually is, made. But a grantee is still designated, though imperfectly, and, for aught that the deed discloses, the party accepting the conveyance may be the only person answering the description given. In all these cases a resort to extraneous facts and circumstances may become necessary in order to ascertain the individual to whom the description was intended to apply; but it is not perceived that the greater or less probability of this should in either case affect the validity of the deed."

**228. A deed to a married woman by the name she bore before her marriage** may be shown by parol evidence to have been made to the person to whom the grant was intended to be made; that her marriage was unknown to the grantor; and that there was no other person claiming to bear the name used in the deed, or claiming title under the deed.<sup>1</sup>

**229. A deed to a person by a fictitious name passes the title.** If there be a person in existence to whom delivery of the deed is made, the deed is not a nullity, but transfers the title to the person to whom it is delivered.<sup>2</sup> It makes no difference in the legal effect of a deed delivered to the actual purchaser that he is called by some other name than his own. He may assume a name for the occasion, and a conveyance to and by him under such name will pass the title. In a New York case so deciding, Mr. Justice Earl said: <sup>3</sup> "In executing any instruments, I can find no authorities which hold that one is not bound by the name he adopts or uses. *Pro hac vice*, it is his name." If one accepts and places on record a conveyance of land to himself, wherein his name as grantee is erroneously written, he is presumed to know

<sup>1</sup> Scanlan v. Wright, 13 Pick. 523, 25 Am. Dec. 344; Wilkerson v. Schoonmaker, 77 Tex. 615, 14 S. W. Rep. 223.      lon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347; Garwood v. Hastings, 38 Cal. 216. See Barr v. Schroeder, 32 Cal. 609; Thomas v. Wyatt, 31 Mo. 188, 77 Am. Dec. 640.

<sup>2</sup> Wilson v. White, 84 Cal. 239, 24 Pac. Rep. 114; David v. Williamsburgh Ins. Co. 83 N. Y. 265, 38 Am. Rep. 418; Fal-      <sup>3</sup> David v. Williamsburgh Ins. Co. 83 N. Y. 265, 38 Am. Rep. 418.

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the misnomer, and to have adopted such name for the purpose of acquiring and holding such land; and he has no cause to complain if, in judicial proceedings against him with respect to the title, he is designated by that name.<sup>1</sup>

230. A deed to the heirs of a living person, without naming them, is void for uncertainty.<sup>2</sup> Mr. Justice Wilde, delivering the opinion, said: "The difficulty is to ascertain the intention of the grantor. Supposing we may understand that children were intended, are after-born children to be included, or those only who were *in esse* at the time of the grant? Was it meant that the grant should take effect immediately, or at the death of the father? Suppose there were no children then surviving, would the brothers and sisters take? We have no certain means of ascertaining the grantor's intention in these particulars: it is all uncertain, and there is nothing in the deed to clear away the uncertainty."

This rule does not apply in Pennsylvania, where registry stands for livery of seisin, except in case the grant is of incorporeal interests which are not susceptible of livery.<sup>3</sup>

231. This rule does not apply where there is anything in the deed from which it may be inferred that the word "heirs" was not used in its technical sense, but as meaning children. There is a strong tendency to restrict if not to discard this technical rule, on the ground that it often defeats the clear intention of the grantor, and seldom gives effect to his intention. Therefore the intention of the grantor in using the term "heirs" is sought for, and, if discovered, is carried into effect. If the deed uses the word "heirs" to designate a class of persons, as, for instance,

<sup>1</sup> *Blinn v. Chesseman*, 49 Minn. 140, 51 N. W. Rep. 666.

<sup>2</sup> *Perkins*, § 52; *Hall v. Leonard*, 1 Pick. 27, 31, upon which case the whole series of American decisions to the same effect seems to rest. *Morris v. Stephens*, 46 Pa. St. 200; *Winslow v. Winslow*, 52 Ind. 8. See *Lyles v. Lescher*, 108 Ind. 382, 9 N. W. Rep. 365. *Elliott, J.*, speaking for the court, seriously doubted the correctness of the decision in *Winslow v. Winslow*, *supra*. But that case was directly affirmed in *Outland v. Bowen*, 115 Ind. 150, 17 N. E. Rep. 281, and in *Tin-*

*der v. Tinder*, 131 Ind. 381, 30 N. E. Rep. 1077, and later still in *Booker v. Tarwater* (Ind.), 37 N. E. Rep. 979.

<sup>3</sup> *Huss v. Stephens*, 51 Pa. St. 282. *Woodward, C. J.*, referring to the case of *Hall v. Leonard*, 1 Pick. 27, said "If the learned judge of the Supreme Court of Massachusetts had noticed that this rule from *Perkins* was predicated of incorporeal interests, which lie in grant and are not susceptible of livery, he would not have misled us into applying it to a conveyance of land here in Pennsylvania, where registry stands instead of livery."

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the children of a person living, and not his possible descendants, or an indefinite line of descendants, then the word "heirs" will be taken to mean the living children of the person named, and effect will be given to the deed as a conveyance to such children. Accordingly, where a deed was to a married woman and the heirs of herself and her husband named, it was held that the estate conveyed vested immediately in him and the children then living of herself and her husband. The word "heirs" as used in this deed was considered as descriptive of a class, and as meaning the children of the persons named;<sup>1</sup> and so, where the words of a deed were "to have and to hold the same to the said Nancy West and her present heirs forever," it was held that Nancy West and her apparent heirs took the estate in common.<sup>2</sup>

If there are words restricting the meaning of the word "heirs" to grandchildren, the latter will take title under the deed. Thus, where one made a deed to the heirs of his son "for the natural love and affection he hath for his grandchildren," it was held that the grandchildren were sufficiently described to take under the deed.<sup>3</sup>

232. If there are no words in a deed to indicate that the grantor used the word "heirs" in otherwise than its strict legal sense, then it must be taken in that sense. "He may have meant 'children,' and he may have meant 'heirs.' This makes it wholly uncertain as to who the grantees were. If he had used words in addition indicating that he meant children by the word 'heirs,' that would have been certain enough, but he might have meant 'heirs' in the legal signification of the word. If he did, then, in addition to the fact that a man cannot have heirs while

<sup>1</sup> *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. Rep. 1077. To like effect, *Tucker v. Tucker*, 78 Ky. 503; *Brann v. Elzey*, 83 Ky. 440.

<sup>2</sup> *Franklin Co. C. & M. Co. v. Beckleheimer*, 102 Ind. 76, 1 N. E. Rep. 202.

<sup>3</sup> *Huss v. Stephens*, 51 Pa. St. 282. Woodward, C. J., said: "Now, when in this deed the grant is to the heirs of a son and to their heirs and assigns forever, and the other word 'grandchildren' comes in as a *designatio personarum*, — as the grantor's definition of what he means by 'heirs,' — where is the room to doubt,

either upon reason or authority, that we ought to construe 'heirs' a word of purchase, meaning the grandchildren, and thus serve the intent? It is an instance where the context of the instrument proves that the word 'heirs' is to be taken in its popular and not its technical sense. Acknowledging the consideration of the instrument to be love and affection for his grandchildren, he intended, by that sure token, that they should take an estate from him. Had he named them he could scarcely have been better understood."

he lives, it would always remain a matter of great uncertainty who the man's heirs would be until he dies; so that, if he meant 'heirs,' in the legal signification of the word, it is void for uncertainty, and because he could have no heirs while he lives. But as we do not know whether he meant 'heirs' in the legal signification of the word, or 'children,' the deed is equally void for uncertainty in the grantee."<sup>1</sup>

But even where there are no words restricting the meaning of the word "heirs," it has been held that a deed to the heirs of a living person vests the title in his children.<sup>2</sup> The word "heirs" in such case is not used in its technical sense, but as meaning the apparent heirs of the living person at the time of the execution of the deed. The same rule applies in the case of a will. As declared in an earlier case in New York, "where the will recognizes the ancestor as living, and makes a devise to the heir *eo nomine*, this shows that the term was not used in its strictest sense, but as meaning the heir apparent of the ancestor named."<sup>3</sup>

233. A deed to a person named "and her children" is not void as to the mother or her children living at the time the deed was made. Such children can be identified by parol evidence, and they and their mother take the title as tenants in common,<sup>4</sup> but children subsequently born take no title.<sup>5</sup> If in such case the grantee named has no children at the time of the execution of the deed, such grantee takes the entire property to the exclusion of children born subsequently to the execution of the deed.<sup>6</sup>

If a deed be made to one and his heirs, designating as such his children by name, the conveyance is in effect to the grantee and the children named as tenants in common. The word "heirs" was used in the sense of "children."<sup>7</sup>

<sup>1</sup> *Booker v. Tarwater* (Ind.), 37 N. E. Rep. 979, 982, per McCabe, J.

<sup>2</sup> *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. Rep. 959. To like effect, *Tharp v. Yarbrough*, 79 Ga. 382, 4 S. E. Rep. 915.

<sup>3</sup> *Heard v. Horton*, 1 Denio, 165, 43 Am. Dec. 659.

<sup>4</sup> *Moore v. Lee* (Ala.), 17 So. Rep. 15; *Vanzant v. Morris*, 25 Ala. 285; *Varner v. Young*, 56 Ala. 260; *Mason v. Pate*, 34 Ala. 379; *Williams v. McConico*, 36 Ala. 22; *Hamilton v. Pitcher*, 53 Mo.

334. The habendum was to them and their heirs and assigns forever. *Arthur v. Weston*, 22 Mo. 378.

<sup>5</sup> *Glass v. Glass*, 71 Ind. 392.

<sup>6</sup> *Baird v. Brookin*, 86 Ga. 709, 12 S. E. Rep. 981; *Lofton v. Murchison*, 80 Ga. 391, 7 S. E. Rep. 322, a case of a will; *Loyless v. Blackshear*, 43 Ga. 327; *Estill v. Beers*, 82 Ga. 608, 9 S. E. Rep. 596.

<sup>7</sup> *Brassington v. Hanson*, 149 Pa. St. 289, 24 Atl. Rep. 344.

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But a conveyance made to a woman and her children living at the time or after-born vests a life estate only in the mother, with remainder to her children.<sup>1</sup>

234. **Certainty as to the grantee is essential.** If the deed does not itself make it certain who is the grantee, it must afford the means of ascertaining with certainty who he is through evidence *aliunde*. A deed "to the estate" of a person deceased is a nullity.<sup>2</sup> The executor or administrator is the legal representative of the deceased, and the estate is something that cannot be recognized at all as a party to a contract. The fact that the grantors were executors of the will of the deceased, and were authorized by the will and an order of court to distribute his estate, is not sufficient to identify the grantees intended.

A deed "to the legatees and devisees" of a deceased person named sufficiently describes the grantees, for they may be ascertained by reference to the will.<sup>3</sup>

A deed granting a right of way to the "owner or owners of the brick house, and curtilage" described in the deed is insufficient to enable any one to claim the right of way.<sup>4</sup>

A deed which for the want of a grantee passes no legal estate may be sufficient to create a trust which a court of equity will protect by appointing a trustee to receive the legal title from the grantor or his heirs; as where a deed was made naming no grantee, "for the use of a school-house, if the neighboring inhabitants see cause to build a school-house thereon."<sup>5</sup>

III. *Corporations and Associations as Grantees.*

235. **A corporation, when made a grantee, should be described by its official name.** A grant to a corporation is good, however, if it clearly appears from the deed itself what corporation was intended, though an omission or mistake may have been made in the corporate name.<sup>6</sup>

<sup>1</sup> *Kinney v. Mathews*, 69 Mo. 520; *Carr v. Estill*, 16 B. Mon. 309. And see *Jeffery v. De Vitre*, 24 Beav. 296; *Froggatt v. Wardell*, 3 De G. & S. 685.

<sup>2</sup> *McInerney v. Beck* (Wash.), 39 Pac. Rep. 130, per Dunbar, C. J.; *Simmons v. Spratt*, 20 Fla. 495, 1 So. Rep. 860.

<sup>3</sup> *Webb v. Den*, 17 How. 576.

<sup>4</sup> *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. Rep. 669.

<sup>5</sup> *Bailey v. Kilburn*, 10 Met. 176, 43 Am. Dec. 423.

<sup>6</sup> *Lynne Regis Case*, 10 Coke, 122 b.; *Dr. Ayray's Case*, 11 Coke, 18 b.; *Pitt v. James*, Hob. 121 b.; *Dutch West India Co. v. Van Moses*, 1 Strange, 612; *Croydon Hospital v. Farley*, 6 Taunt. 467.

The fact that the grantor at the time of the execution of the deed was ignorant that the grantee was a body corporate does not change the rule that such grantee must be named or described with certainty.<sup>1</sup>

A deed to an imaginary corporation passes no title.<sup>2</sup>

A *de facto* corporation is capable of taking title as grantee.<sup>3</sup>

**236.** The corporation must have a legal existence and be capable of taking a conveyance. Thus a deed purporting to convey land to a corporation, before such corporation was organized, is a nullity: it passes no title to any one.<sup>4</sup> A qualification of this rule is to be noted as regards corporations which have a *de facto* existence, either from long recognition as such, or from recognition after an imperfect organization, though they cannot produce any charters which show their incorporation.<sup>5</sup> A voluntary association of persons not incorporated has no legal capacity to take a conveyance of land, and a deed to such an association by name passes no title.<sup>6</sup>

But a conveyance to an unincorporated company which is shortly afterwards duly organized as a corporation, and goes into possession under the deed, passes a title to such corporation as against one not holding by a superior title, but under a subsequent tax sale.<sup>7</sup>

**237.** A deed to the trustees or officers by name of an unincorporated association is good, for in such case the title vests in such trustees or officers as individuals. The words naming the association are regarded merely as words descriptive of the persons.<sup>8</sup> A deed to one described as administrator is a grant to him individually; therefore, where an administrator became indebted to the estate, and for the purpose of securing such indebt-

<sup>1</sup> *Asheville Division v. Aston*, 92 N. C. 578.

<sup>2</sup> *Russell v. Topping*, 5 McLean, 194, 202; *Harriman v. Southam*, 16 Ind. 190.

<sup>3</sup> *Smith v. Sheeley*, 12 Wall. 358; *Myers v. Croft*, 13 Wall. 291.

<sup>4</sup> *Douthitt v. Stinson*, 63 Mo. 268; *Harriman v. Southam*, 16 Ind. 190; *Russell v. Topping*, 5 McLean, 195.

<sup>5</sup> *Mercers of Shrewsbury v. Hart*, 1 Car. & P. 113; *Smith v. Sheeley*, 12 Wall. 358; *Myers v. Croft*, 13 Wall. 291.

<sup>6</sup> *German Land Asso. v. Scholler*, 10 Minn. 331, 338.

<sup>7</sup> *Clifton Heights Land Co. v. Randell*, 82 Iowa, 89, 47 N. W. Rep. 905.

<sup>8</sup> *Austin v. Shaw*, 10 Allen, 552; *Towar v. Hale*, 46 Barb. 361; *Bundy v. Birdsell*, 29 Barb. 31; *Brown v. Combs*, 29 N. J. L. 36; *Den v. Hay*, 21 N. J. L. 174; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. Rep. 246; *Douthitt v. Stinson*, 63 Mo. 268; *Bayley v. Onondaga Ins. Co.* 6 Hill, 476, 41 Am. Dec. 759; *Vansant v. Roberts*, 3 Md. 119.

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edness executed a mortgage to himself as administrator to secure the same, the mortgage was held invalid for want of contracting parties.<sup>1</sup>

A deed to persons named, for the use of a church described not then incorporated, vests the title in such persons, who stand seised to the use of the church; and when the church afterwards acquires a legal capacity to take and hold title, the statute executes the possession to the use, and the estate vests in the incorporated church.<sup>2</sup>

When a deed is made to trustees named, and the beneficiaries can be determined with certainty, the conveyance is not void. If a deed be made to the trustees of a building association, there is no uncertainty which will avoid the conveyance if the members of the association can be ascertained. In such a case the Supreme Court of Illinois said: "The association, not being incorporated, was, in contemplation of law, a mere copartnership, composed of the several associates, who executed and thereby became parties to the trust agreement, and the name adopted by the agreement may be regarded as their firm or copartnership name. The copartners were all natural persons, whose identity was fixed and ascertained by the agreement itself. The grantees in the deeds, therefore, if they took the land in trust, took it in trust for their firm, composed of ascertained partners, all capable of becoming beneficiaries of the trust. The case, then, is not one where deeds creating trusts may be held to be void by reason of the incapacity of the beneficiaries to take and hold the title."<sup>3</sup>

238. A deed to persons named, "trustees" of an incorporated society, "their successors in office and assigns," vests the title in such persons and not in the society. A statute which provides that, where one holds land under a deed to the "use, confidence, or trust" of another, the title shall be deemed to be in the latter, does not have the effect to vest the title in the corporation, because the deed does not create an express trust, but only an implied or constructive trust.<sup>4</sup>

But a deed "to the trustees" of a corporation, without naming

<sup>1</sup> *Gorham v. Meacham*, 63 Vt. 231, 22 Atl. Rep. 572.

<sup>2</sup> *Reformed Dutch Church v. Veeder*, 4 Wend. 494.

<sup>3</sup> *Hart v. Seymour*, 147 Ill. 598, 35 N. E. Rep. 246.

<sup>4</sup> *United Brethren Church v. First Methodist Church*, 138 Ill. 608, 28 N. E. Rep. 829.

them, vests the legal title in the corporation;<sup>1</sup> and a deed "to the trustees" of an unincorporated society, which by statute is entitled to receive grants of land, is a grant to the association.<sup>2</sup> If a deed be made to a voluntary unincorporated association which is not authorized to take and hold real estate, and all the members of it may be ascertained, it may be construed as a grant to those who are properly described under the name of the association. They would hold the land as tenants in common.<sup>3</sup>

**239. The misnomer of a corporation intended to be the grantee does not invalidate the deed when the true name of the corporation appears in the covenant of warranty or other part of the deed,<sup>4</sup> or when it appears in any way from the deed itself what corporation was intended.<sup>5</sup> A misnomer of a corporation has the same legal effect as the misnomer of an individual;<sup>6</sup> it is only necessary in either case that it should clearly appear from the deed by name or description that a particular grantee capable of identification was intended. The corporation intended may be shown upon proper averments and proof.<sup>7</sup> An abbreviation of the name of a corporation made a grantee in a deed does not invalidate it if the abbreviation may be explained and made definite by extrinsic evidence.<sup>8</sup>**

Where at the time of the execution of a mortgage to a corpo-

<sup>1</sup> *Keith & Perry Coal Co. v. Bingham*, 97 Mo. 196, 10 S. W. Rep. 32.

<sup>2</sup> *Lawrence v. Fletcher*, 8 Met. 153.

<sup>3</sup> *Byam v. Bickford*, 140 Mass. 31, 2 N. E. Rep. 687.

<sup>4</sup> *Centenary M. E. Church v. Parker*, 43 N. J. Eq. 307, 12 Atl. Rep. 142; *St. Louis Hospital v. Williams*, 19 Mo. 609; *Douglas v. Branch Bank*, 19 Ala. 659; *Berks, &c. Road v. Myers*, 6 S. & R. 12, 9 Am. Dec. 402; *Pierce v. Somersworth*, 10 N. H. 369.

<sup>5</sup> *Asheville Division v. Aston*, 92 N. C. 578, 16 Am. & Eng. Corp. Cas. 94.

<sup>6</sup> *Case of Lynne Regis*, 10 Coke, 122 b.; *Carlisle v. Blamire*, 8 East, 487; *Ryan v. Martin*, 91 N. C. 464, per Merriman, J.; *Den v. Hay*, 21 N. J. L. 174; *Inhabitants v. String*, 10 N. J. L. 323; *Culpepper, &c. Soc. v. Digges*, 6 Rand, 165, 18 Am. Dec. 708. In *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. Rep. 734, 17 S. W. Rep.

393, a deed recited that it was made by the Ranger Cattle Company, of "Shackelford" County, while the execution thereof was by the Ranger Cattle Company, of "Throckmorton" County, which was its correct name. The vice-president of the company executed the deed and affixed its corporate seal, and it purported to be the act of the corporation. It was held that the recital was a misnomer, and was cured by the execution and acknowledgment.

<sup>7</sup> *Kentucky Seminary v. Wallace*, 15 B. Mon. 35; *Inhabitants v. String*, 10 N. J. L. 323; *New York Annual Conference v. Clarkson*, 8 N. J. Eq. 541; *Medway Cotton Manuf. Co. v. Adams*, 10 Mass. 360; *Bower v. Bank*, 5 Ark. 234; *Woolwich v. Forrest*, 2 N. J. L. 84; *Bruce v. Cro-mar*, 22 Up. Can. Q. B. 321.

<sup>8</sup> *Aultman & T. Manuf. Co. v. Richardson*, 7 Neb. 1.



ration its name had recently been changed, the mortgage made to it by its former name is valid; and in a foreclosure suit by the corporation the mortgagor cannot contend that at the date of the mortgage no such corporation existed, though the corporation in its complaint should aver that the mortgage was executed to the corporation under the name stated in the mortgage.<sup>1</sup>

240. If there are two corporations of the same name, and a conveyance is made to one of them, the grantee may be identified by evidence aliunde, as, for instance, by evidence as to which corporation paid the purchase-money and received delivery of the deed. The Virginia Iron Company of Duluth attempted to amend its articles of association by changing its name to the Kentucky Iron Company, but the attempt failed, because the secretary of state returned the certified amendment stating that there was another corporation of the same name having its place of business at Duluth. Before this fact was known, the Virginia Iron Company purchased from one Milligan land which he conveyed to it under its new name of Kentucky Iron Company. To cure this error the Virginia Iron Company obtained a reconveyance to Milligan from the original Kentucky Iron Company, which was executed by the president and secretary of the company without express authority from the directors or stockholders of the company, and Milligan conveyed to the Virginia Iron Company. A third person, seeing upon record the conveyance to the Kentucky Iron Company, made a sale of property to the original company, taking in payment shares of its corporate stock. This person claimed that the title to the land conveyed by Milligan to the Kentucky Iron Company passed to the real company of that name, and he asked to have the deed of that company to Milligan and his deed to the Virginia Iron Company cancelled. It was held that the title did not pass to the Kentucky Iron Company, because it did not purchase the land and was not the intended grantee. The deed was not delivered to it, nor to any one for it. The land was purchased by the Virginia Iron Company and the deed delivered to it, and the title passed to it under another name.<sup>2</sup>

<sup>1</sup> City Bank v. McClellan, 21 Wis. 112. Rep. 955. Gilfillan, C. J., said: "The

<sup>2</sup> Clarke v. Milligan (Minn.), 59 N. W. only question, then, is, were Milligan and

**241.** A deed to the inhabitants of a town or county not incorporated passes no title.<sup>1</sup> A deed to the "board of directors" of a town not incorporated is also a nullity.<sup>2</sup> A deed "to the members" of a church is void for the want of certainty as to the grantees.<sup>3</sup>

A grant to the inhabitants of a certain neighborhood not incorporated is void if the neighborhood is not defined with certainty, or its exact limits cannot be ascertained. It is a conveyance only to the persons who were inhabitants at the time of the grant, and these cannot be ascertained if the territory of the neighborhood is not defined.<sup>4</sup> A grant to an unincorporated association may be construed as a grant to the individual members of the association, if these can be ascertained to a certainty.<sup>5</sup>

If a mortgage be made to persons described as trustees of an association which is not incorporated, the legal title vests in such persons. Inasmuch as they are trustees they take as joint tenants, and all must join in an assignment of the mortgage or other conveyance of their title. An assignment of the mortgage by the association is invalid, as that has no title.<sup>6</sup>

**242.** An unincorporated society or association has no legal capacity to take or hold real property.<sup>7</sup> If the persons belonging to the society or association can be determined with certainty, they may perhaps take title as individuals. So a grant to the inhabitants of a certain territory clearly defined may be a valid grant to such persons as were inhabitants at the time of the

the Virginia Iron Company, or was either of them, estopped to deny that the deed passed the title to the Kentucky Iron Company by reason of the facts that it was placed on record; that plaintiffs saw it there, and were thereby induced to believe that company to be the owner of the land, and in consequence to exchange their leases for its stock? The parties having acted in good faith, and in ignorance of the fact that there was already existing, at the time of the attempted change of name, a corporation styled the Kentucky Iron Company, there could be no estoppel, except on the proposition that it was culpable negligence not to know of the existence of such other corporation, and not to know that the at-

tempted change of name had failed. We do not think it was culpable negligence, such as will form the basis of estoppel."

<sup>1</sup> *Jackson v. Corey*, 8 Johns. 385; *Hanbeck v. Westbrook*, 9 Johns. 73; *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *Sloane v. McConahy*, 4 Ohio, 157, 169.

<sup>2</sup> *Douthitt v. Stinson*, 63 Mo. 268.

<sup>3</sup> *Morris v. State*, 84 Ala. 457, 4 So. Rep. 628.

<sup>4</sup> *Thomas v. Marshfield*, 10 Pick. 364.

<sup>5</sup> *Byam v. Bickford*, 140 Mass. 31, 2 N. E. Rep. 687; *Kelley v. Bourne*, 15 Ore. 476, 16 Pac. Rep. 40.

<sup>6</sup> *Austin v. Shaw*, 10 Allen, 552.

<sup>7</sup> *German Land Assn. v. Scholler*, 10 Minn. 331; *Douthitt v. Stinson*, 63 Mo. 268.

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grant. But a grant to the inhabitants of a neighborhood not defined is void for uncertainty.<sup>1</sup>

It may be, however, that such a deed is void because of the uncertainty as to the persons who are beneficially interested under the trust, as where the trust was for a voluntary association for the purpose of acquiring homesteads for the members in the public lands.<sup>2</sup>

243. A deed to persons named, and their associates, is void for uncertainty. But a deed to persons named, for themselves and their associates, being a settlement of friends on the west side of Seneca Lake, vests the legal estate in such persons as trustees for the association. The grant is free from uncertainty, because it is evident that the associates had only an equitable interest.<sup>3</sup> A grant to several persons by name for and in behalf of themselves and their associates, the inhabitants of a town named, is a valid grant, inasmuch as the persons named would take title as trustees.<sup>4</sup>

IV. *Partnerships as Grantees.*

244. A deed to persons named, described as constituting a firm, conveys a legal title to such persons as tenants in common, though such title may be subject to partnership equities.<sup>5</sup>

A mortgage to the "City Investment and Advance Company" is a mortgage to the individuals composing the firm using this name and style; and when it is ascertained who the persons are who carry on the business under that name, the deed operates to convey the property to them.<sup>6</sup> A mortgage to the "Chicago Lumber Company," under which name two persons conducted

<sup>1</sup> Thomas v. Marshfield, 10 Pick. 364.

<sup>2</sup> German Land Asso. v. Scholler, 10 Minn. 331.

<sup>3</sup> Jackson v. Sisson, 2 Johns. Cas. 321.

<sup>4</sup> North Hempstead v. Hempstead, 2 Wend. 109; Natchez v. Minor, 9 Sm. & M. 544, 48 Am. Dec. 727.

<sup>5</sup> Morse v. Carpenter, 19 Vt. 613; McCauley v. Fulton, 44 Cal. 355; Blanchard v. Floyd, 93 Ala. 53, 9 So. Rep. 418; Jones v. Morris, 61 Ala. 518; Lindsay v. Hoke, 21 Ala. 542; Slaughter v. Doe, 67 Ala. 494; Caldwell v. Parmer, 56 Ala.

405; Murray v. Blackledge, 71 N. C. 492; Printup v. Turner, 65 Ga. 71; Hunter v. Martin, 2 Rich. 541; Orr v. How, 55 Mo. 328; Baldwin v. Richardson, 33 Tex. 16; Wilson v. Hunter, 14 Wis. 683; Sherry v. Gilmore, 58 Wis. 324, 17 N. W. Rep. 252; Jones v. Neale, 2 Pat. & H. 339, 350; Hoffman v. Porter, 2 Brock. 156; Newton v. McKay, 29 Mich. 1; Kelley v. Bourne, 15 Oreg. 476, 16 Pac. Rep. 40.

<sup>6</sup> Maugham v. Sharpe, 17 C. B. N. S. 443.

their business, may be foreclosed by them under proper allegations that they conducted business under that name.<sup>1</sup>

If the partnership name contains the surname or surnames of one or more of the partners, the instrument will have legal effect as a conveyance or mortgage to the partner or partners thus named.<sup>2</sup> Under this rule it is not necessary that the full names of such partners be given. Thus a deed to "Farnham & Lovejoy," of a town named, is a sufficient conveyance to Sumner W. Farnham and James A. Lovejoy, who are shown to constitute the firm doing business under such partnership name;<sup>3</sup> for resort may always be had to facts beyond the instrument for the purpose of applying the description or designation of the persons named to the persons so described.<sup>4</sup>

Where the grantees described in a deed are A, B & Co., the firm consisting of A and B, and other persons described only under the general term "company," A and B take the title for themselves and in trust for those associated with them.<sup>5</sup> It is proper, however, for all the members of such firm, though their names do not appear in the firm name and style, to join in a conveyance of land acquired under a conveyance to the partnership; and it is not necessary, though desirable, that the deed should recite that these persons constituted the partnership.<sup>6</sup>

A deed to A & Co. vests the legal title in A alone.<sup>7</sup>

If land be sold to a partnership, and a deed be made to it in the firm name of Blanchard & Burrus, but one of the partners dies before the deed is delivered, it conveys to the surviving partner an undivided half interest in the land. The heirs at law of

<sup>1</sup> *Chicago Lumber Co. v. Ashworth*, 26 Kans. 212.

<sup>2</sup> *Dunlap v. Green*, 60 Fed. Rep. 242; *Morse v. Carpenter*, 19 Vt. 613; *Beaman v. Whitney*, 20 Me. 413; *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. Rep. 252; *Jones v. Neale*, 2 Pat. & H. 339; *Menage v. Burke*, 43 Minn. 211, 45 N. W. Rep. 155; *Gille v. Hunt*, 35 Minn. 357, 29 N. W. Rep. 2; *Foster v. Johnson*, 39 Minn. 378, 40 N. W. Rep. 255; *McMurry v. Fletcher*, 28 Kans. 337.

<sup>3</sup> *Menage v. Burke*, 43 Minn. 211, 45 N. W. Rep. 155.

<sup>4</sup> *Dunlap v. Green*, 60 Fed. Rep. 242; *Wakefield v. Brown*, 38 Minn. 361, 37 N.

W. Rep. 788; *Morse v. Carpenter*, 19 Vt. 613.

<sup>5</sup> *Beaman v. Whitney*, 20 Me. 413; *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. Rep. 282, 55 Am. Rep. 871.

<sup>6</sup> *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. Rep. 282, 55 Am. Rep. 871.

<sup>7</sup> *Ketchum v. Barber* (Cal.), 12 Pac. Rep. 251; *Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57; *Arthur v. Weston*, 22 Mo. 378; *Percifull v. Platt*, 36 Ark. 456, 464; *Chavener v. Wood*, 2 Oreg. 182; *Lindsay v. Jaffray*, 55 Tex. 626, 641; *Moreau v. Saffarans*, 3 Sneed, 595, 67 Am. Dec. 582.

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the deceased partner would succeed to his equitable interest, the purchase-money having been paid, and the grantor would be compelled to convey such interest to them.<sup>1</sup>

245. Some courts have taken the distinction that a deed to a partnership by the partnership name alone does not pass the legal title to the land, but only an equitable title.<sup>2</sup> A partnership is not recognized in law as a person, and the legal title to real property can only be held by a person, or by a corporation, which is deemed such at law. A deed to a partnership may be given effect as a contract to convey.<sup>3</sup> The individual members of the firm, in whom the legal title should vest, may be identified by extrinsic evidence. By implication the deed vests in the members of the firm the power to convey.<sup>4</sup> But even where this distinction is taken between the legal and equitable title, it is declared that where a partnership as a grantee in a deed contains the name or names of one or more of the partners, the legal title vests in the partner or partners so named.<sup>5</sup>

<sup>1</sup> *Blanchard v. Floyd*, 93 Ala. 53, 9 So. Rep. 418.

<sup>2</sup> *Percifull v. Platt*, 36 Ark. 456; *Land Asso. v. Scholler*, 10 Minn. 331; *Morrison v. Mendenhall*, 18 Minn. 232; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. Rep. 497; *Gille v. Hunt*, 35 Minn. 357, 29 N. W. Rep. 2; *Foster v. Johnson*, 39 Minn. 378, 40 N. W. Rep. 255; *Townshend v. Goodfellow*, 40 Minn. 312, 41 N. W. Rep. 1056; *Dunlap v. Green*, 60 Fed. Rep. 242; *Ram-*

*melsberg v. Mitchell*, 29 Ohio St. 22, 52; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. Rep. 440; *Baldwin v. Richardson*, 33 Tex. 16; *Lowery v. Drew*, 18 Tex. 786.

<sup>3</sup> *Dunlap v. Green*, 60 Fed. Rep. 242; *Kyle v. Roberts*, 6 Leigh, 495.

<sup>4</sup> *Dunlap v. Green*, 60 Fed. Rep. 242.

<sup>5</sup> *Gille v. Hunt*, 35 Minn. 357, 29 N. W. Rep. 2; *Foster v. Johnson*, 39 Minn. 378, 40 N. W. Rep. 255.

## CHAPTER XV.

### RECITALS IN DEEDS.

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|---|-------------------------------------|
| I. Use and effect of recitals, 246-250. | III. Estoppel by recitals, 256-262. |
| II. Recitals as evidence, 251-255.      |                                     |

#### I. *Use and Effect of Recitals.*

246. In the ordinary forms of deeds in general use in this country there are no formal narrative or introductory recitals, and there is no need of them in conveyances in fee simple by absolute owners, though they are useful in more elaborate conveyances, and especially in deeds of settlement and deeds creating partial interests or subordinate estates. This part of a deed formerly had a recognized place and was seldom omitted, though it never was a necessary part of a deed either in law or equity; and the tendency has long been in the direction of dispensing with such recitals. In modern conveyancing brevity is deemed a virtue, and recitals are usually confined to a brief statement of the source of the grantor's title, of the capacity in which he executes the deed, or of its intended operation and effect.<sup>1</sup> Such recitals are a key to the operative part of the deed. These recitals in deeds of indenture immediately follow the description of the parties, though at the present time, in deeds poll, such recitals as are used are often placed at the end of the description of the property, and recitals may be inserted in connection with the words of conveyance, or in the *in testimonium* clause.

The office of narrative recitals is to state the facts and instruments through which the grantor's title is deduced; and the office of introductory recitals is to explain the motive of the grantor in making the conveyance. It is quite important that the immediate source of the title should be stated somewhere in the deed. In this country, at the present day, the account of the title is quite informal, and consists merely of a reference to the deeds under

<sup>1</sup> *Moore v. Magrath*, 1 Cowp. 9, per Mansfield, J.

which the grantor derives his title. This is usually inserted after the description of the property. Where this is done with care in successive deeds of the same land, each recital carries back the title one step, and together the recitals make a connected history of the title. Careful conveyancers at the present time seldom fail to make accurate reference to the grantor's source of title.

**247. Recitals should be confined to statements of facts, and should not contain inferences of law.** Thus, for instance, if the title has come to the grantor by descent, the recital should state what is necessary to prove his heirship, and not merely that he took it as heir of a person named; or, if the title came to him by devise, recitals should be made of the death of the testator seised of the land, of the probate of his will, and of the devise of the land to the grantor, and not merely that the grantor is a devisee of the land.<sup>1</sup>

Recitals of facts in a patent for a land grant bind both the officers of government and the grantee, as well as those in privity with him. But recitals of an opinion of the executive officers as to matters of law are not conclusive.<sup>2</sup>

**248. Recitals should not contain negative statements;** as, for instance, that the testator died without altering or revoking his will. They should not contain matters not relevant to the subject-matter and intended operation of the deed; as, for instance, executors having, in general, no powers over real estate passing by a will, there should be no recital of the appointment of executors. It is not strictly necessary to state the date and place of probate of a will, though such a statement is a convenient one and may properly be added. In reciting powers under a will or settlement, only so much should be stated as is sufficient to show the necessary authority for executing the conveyance.<sup>3</sup>

**249. When the recitals agree with the operative part of a deed they have no legal effect;** and, if the operative part of a deed is clear and unambiguous, recitals at variance with it are of no effect. The operative clause, when clear, always controls the recitals.<sup>4</sup> An operative clause in definite terms controls reci-

<sup>1</sup> 5 Bythewood's Prec. 4th ed. p. 139.

<sup>2</sup> McGarrahan v. New Idria M. Co. 49 Cal. 331.

<sup>3</sup> 5 Bythewood's Prec. 4th ed. pp. 140, 141.

<sup>4</sup> Bailey v. Lloyd, 5 Russ. 330, 344; Holliday v. Overton, 14 Beav. 467; Dawes v. Tredwell, 18 Ch. D. 354, 358, per Jessel, M. R.; Leggott v. Barrett, 15 Ch. D. 306, 311; per Brett, L. J.; Alexander v.

tals in general terms.<sup>1</sup> On the other hand, general words in the operative clause may be restrained by a particular recital.<sup>2</sup> The operative part of a power of attorney appointed attorneys without in terms limiting the duration of their powers; but it was preceded by a recital that the principal was going abroad, and was desirous of appointing attorneys to act for him during his absence. It was held that the recital controlled the generality of the operative part of the instrument, and limited the exercise of the powers of the attorney to the period of the principal's absence from this country.<sup>3</sup>

**250.** Where there is a discrepancy between the recitals and the operative part of the deed, the latter, if certain in its terms, controls.<sup>4</sup> Thus, where the grantor in a preamble to a deed recited that he had given a certain parcel of land to the county to be used as a site for a court-house, but the operative part of the deed did not specify the purpose for which the land was given, but conveyed it for the use of the county, it was properly held that the preamble merely expressed the motive which induced the grantor to make the conveyance, and did not create a condition that the land should be used for a court-house.<sup>5</sup>

The description of the property in the operative clause, when made in language that admits of no uncertainty, is never controlled by mere recitals.<sup>6</sup>

Crosbie, L. & G. 145, per Lord St. Leonards; *Jenner v. Jenner*, L. R. 1 Eq. 361; *Walsh v. Trevanion*, 15 Q. B. 733, 751, per Patteson, J.; *Rooke v. Kensington*, 2 K. & J. 753, 769; *Ingleby v. Swift*, 10 Bing. 84; *Young v. Smith*, L. R. 1 Eq. 180, 183, 35 Beav. 90. In this case, Romilly, M. R., said: "It is of the greatest consequence to keep distinct the different parts of deeds, and to give to recitals and to the operative part their proper effects."

<sup>1</sup> *Dawes v. Tredwell*, 18 Ch. D. 354, 358, per Jessell, M. R.

<sup>2</sup> *Knight v. Cole*, 1 Show. 150, per Lord Holt; *Jenner v. Jenner*, L. R. 1 Eq. 361; *Childers v. Eardley*, 28 Beav. 648; *Ex parte Dawes*, 17 Q. B. D. 275; *Walsh v. Trevanion*, 15 Q. B. 733; *Gray v. Limerick*, 2 De G. & Sm. 370.

<sup>3</sup> *Danby v. Coutts*, 29 Ch. D. 500.

<sup>4</sup> *Hammond v. Hammond*, 19 Beav. 29; *Young v. Smith*, L. R. 1 Eq. 180, 183.

<sup>5</sup> *Miller v. Tunica Co.* 67 Miss. 651.

<sup>6</sup> *Howard v. Shrewsbury*, L. R. 17 Eq. 378, per Jessel, M. R.; *Ex parte Young*, 4 Deac. 185; *Huntington v. Havens*, 5 Johns. Ch. 23, 27, per Chancellor Kent. In *Barratt v. Wyatt*, 30 Beav. 442, Romilly, M. R., said: "As to the construction of the settlement, I do not dispute the proposition which was argued, that, if you find in a settlement recitals indicating various parcels enumerated, from whence it is to be inferred, from reading the recital alone, that these parcels and these alone are to be included in and made subject to the provisions of the deed, but yet you find that in the operative part of the deed one or two of these parcels are omitted, the court may be of opinion, upon the construction of the deed, that the par-



Where, however, the operative part of a deed contains an ambiguity, a clear recital of the same matter will be given controlling effect. Resort may always be had to a recital to explain such ambiguity.<sup>1</sup> "We may consider it settled by authority that where the words of a covenant are ambiguous and difficult to deal with, we may resort to the recitals to see whether they throw any light on its meaning."<sup>2</sup>

## II. *Recitals as Evidence.*

251. A recital is not evidence in favor of the grantor except as to his acts in an official capacity. A recital that the grantor is the heir at law of a person deceased, who was the former owner of the land, is no evidence as against a stranger of either the heirship or the death of such former owner. The recital is, of course, no evidence in favor of the grantor, and it is no better evidence in favor of any one claiming under the grantor. It is no more competent as evidence, as against a stranger to the deed, of the facts stated, than it would be if embodied in a letter or any other paper.<sup>3</sup> Such a recital is merely a claim of heirship.<sup>4</sup>

Recitals in an executor's deed are not competent to establish the testator's will, the probate thereof, and the proceeding ending in the execution of the deed, as against persons not in privity with the grantor. The execution and probate of the will, the appointment and qualification of the executor, the provisions of the will, and the probate proceedings, must be proved by competent evidence without the aid of any recitals in the deed.<sup>5</sup>

A recital, in a deed, of a former deed between the same parties, proves as between the parties so much of the former deed as is recited, but no more.<sup>6</sup>

cells which are omitted in the operative part are omitted by mistake, and are not included in the provisions of the deed. And the converse of that proposition is also true: parcels may be included in the operative part of the deed which the recitals and the rest of the deed show to have been inserted there by mistake. There are several cases to that effect, and amongst them the well-known case, before Lord Mansfield, of *Moore v. Magrath*, 1 Cowp. 9."

*Michell's Trusts*, 9 Ch. D. 5; *In re Neal's Trusts*, 4 Jur. N. S. 6; *Gwyn v. Nenth Canal Co.* L. R. 3 Ex. 209, 219; *Walsh v. Trevanion*, 15 Q. B. 733; *Young v. Smith*, L. R. 1 Eq. 180, 35 Beav. 90.

<sup>2</sup> *In re Michell's Trusts*, 9 Ch. D. 5, 9, per Jessell, M. R.

<sup>3</sup> *Costello v. Burke*, 63 Iowa, 361.

<sup>4</sup> *Potter v. Washburn*, 13 Vt. 558, 37 Am. Dec. 615.

<sup>5</sup> *Miller v. Miller*, 63 Iowa, 387.

<sup>6</sup> *Gillett v. Abbott*, 7 Ad. & E. 783.

<sup>1</sup> *Bailey v. Lloyd*, 5 Russ. 344; *In re*

**252. Recitals in ancient deeds are competent evidence for some purposes, as, for example, to show pedigree,<sup>1</sup> or to show the position of a natural boundary.<sup>2</sup> But such recitals are not admissible to enlarge the estate granted in a prior deed of the same grantor, to the impairment of an intervening title.<sup>3</sup>**

Where a conveyance would be competent evidence as an ancient deed without proof of its execution, the power under which it purports to have been executed will be presumed; and a recital of such power will be held to be sufficient evidence of the existence of such power and of its execution;<sup>4</sup> and a recital of facts equivalent to a power of attorney will have a like effect.<sup>5</sup>

**253. Recitals in an administrator's deed of the acts required by statute in making a sale are prima facie evidence of their performance.** The administrator is an officer of the law, acting under the obligations of his oath of office, and it is presumed that he does his duty, and fulfils the requirements of the statute, until the contrary is proved.<sup>6</sup> This is particularly the case after a lapse of time which makes the instrument an ancient deed.<sup>7</sup> After twenty years' acquiescence by the heirs of an intestate in the possession of land under a sale by the administrator, recitals in his deed may be regarded in aid of the presumption that the administrator had taken the oath of office, and had posted notifications according to law.<sup>8</sup>

A deed by an executor, administrator, guardian, or other person acting in like capacity, should contain recitals of the power under which the grantor acts in making the conveyance. If a person in such representative capacity executes a deed without such recitals, and signs it with the addition merely of the words indicating the capacity in which he intends to act, as, for instance, "administrator," etc., the deed is strictly his own personal deed.<sup>9</sup>

**254. A sheriff's deed should contain recitals sufficient to**

<sup>1</sup> 1 Greenl. Ev. § 104.

<sup>2</sup> Drury v. Midland R. Co. 127 Mass. 571.

<sup>3</sup> Whitney v. Wheeler Cotton Mills, 151 Mass. 396.

<sup>4</sup> Doe v. Phelps, 9 Johns. 169; Williams v. Hardie (Tex. Civ. App.), 21 S. W. Rep. 267; Johnson v. Timmons, 50 Tex. 521, 534; Watrous v. McGrew, 16 Tex. 506, 513; Harrison v. McMurray, 71 Tex. 122, 128, 8 S. W. Rep. 612.

<sup>5</sup> Williams v. Hardie (Tex. Civ. App.), 21 S. W. Rep. 267; Veramendi v. Hutchins, 48 Tex. 531, 553.

<sup>6</sup> Doe v. Henderson, 4 Ga. 148, 48 Am. Dec. 216; Worthy v. Johnson, 8 Ga. 236.

<sup>7</sup> Stevenson v. McReary, 12 Sm. & M. 9.

<sup>8</sup> Gray v. Gardner, 3 Mass. 399.

<sup>9</sup> Bobb v. Barnum, 59 Mo. 394.

show the authority under which he acted in making the sale. They should show the authority to sell, and a sale made substantially according to law.<sup>1</sup> All the facts which constitute the foundation of title, and without which the sale would be void, must be recited.<sup>2</sup>

But recitals other than those which show the sheriff's authority, and his acts in executing it, are not necessary, and may be omitted even when required by statute. Thus a statutory provision, that the sheriff's deed shall recite all the executions issued upon a judgment, is regarded as directory merely, in so far as it relates to other executions than that under which the sheriff acts.<sup>3</sup>

The deed need not recite the amount of the judgment and the names of the parties, if the execution is valid.<sup>4</sup>

A misrecital of facts authorizing a sale by the sheriff does not avoid his deed, if the necessary facts actually exist.<sup>5</sup>

In the case of a sale by a tax-collector the deed must show by its recitals that the statute has been strictly complied with.<sup>6</sup>

**255. Recitals in a deed made by a mortgagee under a power of sale,** of the giving of due notice of the sale, in conformity with the requirements of the statute and in pursuance of the provisions of such mortgage, giving the particulars of the notice, are *prima facie* evidence of such notice.<sup>7</sup> The mortgagee's recitals in such a deed bind not only the mortgagee but as well the mortgagor, equally as if the deed were executed by him in person, for the mortgagee is his attorney in fact.<sup>8</sup>

<sup>1</sup> *Tanner v. Stine*, 18 Mo. 580, 59 Am. Dec. 320; *Lackey v. Lubke*, 36 Mo. 115; *Martin v. Bonsack*, 61 Mo. 556; *Buchanan v. Tracy*, 45 Mo. 437; *Stewart v. Severance*, 43 Mo. 322; *Strain v. Murphy*, 49 Mo. 337.

<sup>2</sup> *Armstrong v. McCoy*, 8 Ohio, 128.

<sup>3</sup> *Jackson v. Pratt*, 10 Johns. 381; *Jackson v. Davis*, 18 Johns. 7; *Armstrong v. McCoy*, 8 Ohio, 128, 31 Am. Dec. 435; *Perkins v. Dibble*, 10 Ohio, 433, 36 Am. Dec. 97; *Buchanan v. Tracy*, 45 Mo. 437; *Ogden v. Walters*, 12 Kans. 282; *Bettison v. Budd*, 17 Ark. 546; *Humphry v. Beeson*, 1 Greene (Iowa), 199, 48 Am.

Dec. 370; *Huggins v. Ketchum*, 4 Dev. & B. 414. If the statute requires a recital of the judgment, a deed without such recital is void. *Dufour v. Camfranc*, 11 Martin (La.), 607, 13 Am. Dec. 360.

<sup>4</sup> *Perkins v. Dibble*, 10 Ohio, 433, 36 Am. Dec. 97; *McGuire v. Kouns*, 7 T. B. Mon. 386, 18 Am. Dec. 187.

<sup>5</sup> *Martin v. Wilbourne*, 2 Hill, 395, 27 Am. Dec. 393; *Harrison v. Maxwell*, 2 Nott. & Mc. 347, 10 Am. Dec. 611.

<sup>6</sup> *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 430, per Lumpkin, J.

<sup>7</sup> *Tartt v. Clayton*, 109 Ill. 579.

<sup>8</sup> *Simson v. Eckstein*, 22 Cal. 580.

III. *Estoppel by Recitals.*

**256.** An estoppel by recital binds the grantor and all who take his estate, privies in blood, privies in estate, and privies in law.<sup>1</sup> The recital does not bind persons who are not privies of the grantor, such as claimants by adverse or prior title, or the grantor's creditors.<sup>2</sup>

A party to a deed must be, *sui juris*, competent to make an effectual contract, to be estopped by a recital.<sup>3</sup>

In a deed by a corporation, a recital by the person who executes it in behalf of the corporation, that he was duly authorized to execute it, estops him to deny that he was so authorized.<sup>4</sup>

But, even as between the parties, a recital is not binding when the proceeding is really collateral to the deed and the title thereby conveyed. In such case the facts recited may be disputed.<sup>5</sup>

A conveyance is not affected by a false recital made by the same grantor on the same day in conveying an adjoining lot to a different grantee.<sup>6</sup>

**257.** A recital, to have the effect of an estoppel, must be a distinct recital of particular facts, and not a recital in general terms. Where a distinct statement of a particular fact is made in a recital, and the parties act with reference to that recital, it is not, as between them, competent for the party bound to deny the recital.<sup>7</sup> "It is said that the recitals of a deed cannot operate by way of estoppel. But the distinction which has always been

<sup>1</sup> Stroughill v. Buck, 14 Q. B. 781; Doe v. Errington, 6 Bing. N. C. 79; Bank of U. S. v. Benning, 4 Cr. C. C. 81; Carver v. Jackson, 4 Pet. 1, 83; West v. Pine, 4 Wash. 691; Doe v. Porter, 3 Ark. 18, 36 Am. Dec. 448; Jackson v. Parkhurst, 9 Wend. 209; Chautauqua Co. Bank v. Risley, 4 Den. 480; Usina v. Wilder, 58 Ga. 178; Rangely v. Spring, 28 Me. 127, 142; Stoutimore v. Clark, 70 Mo. 471; Hasenritter v. Kirchhoffer, 79 Mo. 239; Simson v. Eckstein, 22 Cal. 580; Byrne v. Morehouse, 22 Ill. 603; Pinckard v. Milmine, 76 Ill. 453; Kinsman v. Loomis, 11 Ohio, 475, 478; Doe v. Howell, 1 Houst. 178.

<sup>2</sup> Battersbee v. Farrington, 1 Swans. 106; West v. Pine, 4 Wash. 691; De

Farges v. Ryland, 87 Va. 404; Allen v. Allen, 45 Pa. St. 468.

<sup>3</sup> Bank of America v. Banks, 101 U. S. 240; Jackson v. Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378.

<sup>4</sup> Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99.

<sup>5</sup> Carpenter v. Buller, 8 Mees. & W. 209, 213; Bank of America v. Banks, 101 U. S. 240; Carter v. Carter, 3 K. & J. 617, per Wood, V. C.; *Ex parte* Morgan, 2 Ch. D. 72.

<sup>6</sup> Bay v. Posner (Md.), 29 Atl. Rep. 11.

<sup>7</sup> Carpenter v. Buller, 8 Mees. & W. 209; Bowman v. Taylor, 4 Nev. & M. 262; Heath v. Crealock, L. R. 10 Ch. 22; Crofts v. Middleton, 2 K. & J. 194.

taken is this, — that a general recital will not operate as an estoppel, but the recital of a particular fact will have that effect.”<sup>1</sup> The recital must also be of a material fact and of the essence of the contract.<sup>2</sup> As between the immediate parties to a deed, a recital not necessary to the conveyance does not amount to an estoppel.<sup>3</sup>

A party to a deed is not estopped by recitals contained in other deeds, through which the title is derived, to which he was not a party. Lord Denman said:<sup>4</sup> “Is it true as a general proposition that a party so claiming adopts the statement of facts in an anterior deed which goes to make up his title? We are aware of no authority for such a doctrine.”

**258. A recital, to operate as an estoppel, must be clear and without ambiguity.**<sup>5</sup> “It is a rule,” says Lord Tenterden, “that an estoppel should be certain to every intent, and therefore, if the thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel; nor shall a man be estopped where the truth appears by the same instrument, or that the grantor had nothing to grant, or only a possibility.”<sup>6</sup>

**259. Only the parties to a deed and their privies can take advantage of recitals which operate as estoppels.**<sup>7</sup> “Privies in blood, as the heir; privies in estate, as the feoffee, lessee, etc.; privies in law, as the lords by escheat; tenant by the curtesie, tenant in dower; the incumbent of a benefice; and others that come under by an act in law, or in the post, — shall be bound and take advantage of estoppels.”<sup>8</sup> A stranger to the deed and title cannot take advantage of an estoppel created by it.<sup>9</sup> “Every estoppel ought to be reciprocal,” says Lord Coke, “that is, to bind both parties; and this is the reason that regularly a stranger shall

<sup>1</sup> *Bensley v. Burdon*, 8 L. J. Ch. 85, 87, per Lord Lyndhurst. The law was so laid down by Lord Chief Justice Holt, in the case of *Salter v. Kidley*, Shower's Rep. 59; by Chancellor Kent, in *Huntington v. Havens*, 5 Johns. Ch. 23, 26.

<sup>2</sup> *Carpenter v. Buller*, 8 M. & W. 209, 213; *Fort v. Allen*, 110 N. C. 183, 14 S. E. Rep. 685; *Brinegar v. Chaffin*, 3 Dev. 108.

<sup>3</sup> *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Simson v. Eckstein*, 22 Cal. 580.

<sup>4</sup> *Shelton v. Shelton*, 4 N. & M. 857, 867, 3 Ad. & El. 265, 283. See, however, *Doe v. Stone*, 3 C. B. 176.

<sup>5</sup> *Palmer v. Ekins*, 2 Ld. Raym. 1550, 1553; *Heath v. Crealock*, L. R. 10 Ch. 22; *Hays v. Askew*, 5 Jones L. 63.

<sup>6</sup> *Right v. Bucknell*, 2 B. & Ad. 278, 281.

<sup>7</sup> *Stevenson v. McReary*, 12 Sm. & M. 9, 51 Am. Dec. 102.

<sup>8</sup> Co. Litt. 352 a

<sup>9</sup> *Doe v. Errington*, 8 Scott, 210; *Allen v. Allen*, 45 Pa. St. 468.

neither take advantage nor be bound by the estoppel.”<sup>1</sup> Thus the owner of land conveyed it to several tenants, some of whom afterwards joined with him in executing a mortgage to a stranger, containing a recital that he was the owner of a certain undivided part of the land. A creditor of such owner, after the execution of the mortgage and before it was recorded, attached the land, sold it on execution, bought it at the sheriff’s sale, and then brought ejectment against the tenants in possession, who alleged that the judgment debtor had no title when the attachment was made. To this the creditor set up the recital in the mortgage as an estoppel. It was held that the creditor could not take advantage of this recital, as it was not made to him or to any one under whom he claimed title. Mr. Justice Strong said: “Nor was the recital an admission or declaration made to the plaintiff at the time of the sale, or at any previous time. He was not a party to the mortgage. It was altogether *res inter alios acta*. If he saw it, and did not know it was a mistake or a falsehood, still he was not warranted in relying upon it. I agree that, if the plaintiff had been induced to purchase by anything said by these mortgagors at the sale, or by representations made by them to him previously, they would have been bound by their declarations, and precluded from averring the contrary to the prejudice of his title. But it is an unprecedented extension of the doctrine of equitable estoppel to hold that a man is bound to the world to make good what he has said to any one, if others choose to rely upon it. If every man may be held liable not only to parties and privies to his deed but to all mankind, to make good every introductory recital which the deed contains, it behooves him to avoid all recitals, and be careful what scrivener he employs. Such is not the law, and there are no authorities which assert it. The plaintiff, then, being a stranger to this mortgage, neither a party nor a privy, cannot use it as the basis of an equitable estoppel.”<sup>2</sup>

A recital by one tenant in common in a deed to a stranger cannot affect any right of the other tenant in common.<sup>3</sup>

**260. Whether a recital estops one party or all the parties to the deed depends upon the intention to be gathered from the whole instrument. “Where a recital is intended to be a**

<sup>1</sup> Co. Litt. 352 a.

<sup>3</sup> Thomason v. Dayton, 40 Ohio St.

<sup>2</sup> Sunderlin v. Struthers, 47 Pa. St. 411, 63.

statement which all the parties to a deed have mutually agreed to admit as true, it is an estoppel upon all. "It seems clear that, where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary.<sup>1</sup> But when it is intended to be the statement of one party only, the estoppel is confined to that party."<sup>2</sup>

Thus a recital, in an instrument executed by a husband and wife of one part and a trustee of the other, that it had been agreed between them before their marriage that a certain sum of money belonging to the intended wife should be secured to her separate use, does not purport to be of any fact within the knowledge of the trustee, and he does not affirm the truth of it, but he is at liberty to assert that there was no valid agreement for a marriage settlement; that the agreement being by parol and the settlement being actually made after marriage, it was invalid as against creditors. The trustee afterwards having been made an assignee of the husband for the benefit of his creditors, he was held to be bound to apply the property as the law would apply it, and not in accordance with the invalid settlement.<sup>3</sup>

Where the recitals refer to what the grantors have done, or intend to do, among themselves, and in which the grantees have no part or interest, and include a reference to a previous deed of marriage settlement between the grantors, and there is no evidence that the grantees knew anything of the recited deed except from the recitals, the wording of which indicates that the scrivener did not have the recited deed before him, these recitals will be regarded as the statement of the grantors only. The grantees

<sup>1</sup> *Young v. Raincock*, 7 C. B. 310, 338, per Coltman, J.

<sup>2</sup> *Stroughill v. Buck*, 14 Q. B. 781; *Doe v. Brooks*, 3 Ad. & E. 513. To like effect in *Bower v. McCormick*, 23 Gratt. 310, 328, Christian, J., said: "A mere recital does not conclude all the parties: there must be a direct affirmation, so intended by all the parties, in order to bind all; and this intention may be gathered from the whole instrument." In *Hays v. Askew*, 5 Jones L. 63, 65, Pearson, J., said: "Be-

sides, an estoppel, as a general rule, does not grow out of a recital; to give it that effect, it must show that the object of the parties was to make the matter recited a *fixed fact* as the basis of their action."

<sup>3</sup> *Borst v. Corey*, 16 Barb. 136; *Wil- lard, P. J.*, said: "A mere recital never concludes a party. There must be a direct affirmation. And a recital by A and B can never furnish evidence against C. It is never evidence against strangers."

may show a mistake in such recitals by introducing in evidence the deed referred to in the recitals.<sup>1</sup>

Recitals will estop the grantee only under circumstances which would make the declarations of the grantor, made at the time of the execution of the deed, evidence against the grantee.<sup>2</sup>

**261. A recital that the property granted is subject to a mortgage described estops the grantee**, and every one claiming under him, from denying the validity of the mortgage, if such mortgage was in fact deducted from the amount of the consideration of the purchase.<sup>3</sup> In such case the mortgagor provides for the payment of the mortgage out of the purchase-money. A purchaser of land upon execution, "subject to whatever sum might be due upon the property by virtue of a certain mortgage," cannot dispute the fact of the mortgage or its validity.<sup>4</sup>

Failure or want of consideration as between the parties to a mortgage cannot be set up as a defence by a purchaser of the land "subject to the mortgage," which is in fact a part of the consideration, whether he has expressly assumed the mortgage as a part of the purchase-money or not.<sup>5</sup>

A deed which recites that the property conveyed is subject to a mortgage in favor of a corporation estops a person claiming title through such deed from disputing the corporate existence of the mortgagee.<sup>6</sup>

**262. A recital may operate as a covenant** where such operation appears to have been intended by the parties,<sup>7</sup> and there is no express covenant in the deed relating to the same subject-matter.<sup>8</sup> But "it is plain that the court ought to be cautious in spelling a covenant out of a recital of a deed;" because that

<sup>1</sup> *Bower v. McCormick*, 23 Gratt. 310.

<sup>2</sup> *Joeckel v. Easton*, 11 Mo. 118.

<sup>3</sup> *Jones on Mortgages*, §§ 744, 1491; *Pratt v. Nixon*, 91 Ala. 192; *Freeman v. Auld*, 44 N. Y. 50, 37 Barb. 587; *Hardin v. Hyde*, 40 Barb. 435; *Johnson v. Thompson*, 129 Mass. 398.

<sup>4</sup> *Conkling v. Secor Sewing Machine Co.* 55 How. Pr. 269.

<sup>5</sup> *Horton v. Davis*, 26 N. Y. 495; *Pratt v. Nixon*, 91 Ala. 192, 8 So. Rep. 751; *Price v. Pollock*, 47 Ind. 362; *West v. Miller*, 125 Ind. 70, 25 N. E. Rep. 143; *Bennett v. Mattingly*, 110 Ind. 197, 10 N.

E. Rep. 299, 11 N. E. Rep. 792; *Schee v. McQuilken*, 59 Ind. 269; *Studabaker v. Marquardt*, 55 Ind. 341.

<sup>6</sup> *Hasenretter v. Kirchhoffer*, 79 Mo. 239.

<sup>7</sup> *Young v. Smith*, 35 Beav. 87; *Lay v. Mottram*, 19 C. B. N. S. 479; *Monypenny v. Monypenny*, 4 K. & J. 174, 3 De G. & J. 572, 9 H. L. C. 114; *Sampson v. Easterby*, 9 B. & C. 505, 6 Bing. 644; *Hollis v. Carr*, Freem. Ch. 3, 2 Mod. 86.

<sup>8</sup> *Dawes v. Tredwell*, 18 Ch. D. 354, per Jessell, M. R.; *Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 313.



is not the part of a deed in which covenants are usually expressed.<sup>1</sup>

Where it distinctly appears from the whole deed that it was intended to express by the recital the whole arrangement and transaction, the recital amounts to a covenant. Thus, where it was recited that a debtor against whom an action had been commenced had agreed to convey to the creditor certain land to secure the debt, and that it had been agreed that the debtor "shall be at liberty to sign judgment in said action, but that no execution shall issue thereon until this present security be realized," it was held that the recital amounted to a covenant by the creditor not to issue execution until the realization of the security. If the recital had been that "it has been agreed that no execution shall issue," this would clearly have been a covenant to that effect, and the intention sufficiently appears from the words used.<sup>2</sup>

Where, after the description of the property, there was the further statement that it was late the property of the grantor's father then deceased, it was held that the words did not amount to a covenant by the grantor that his father was seised of an indefeasible estate in fee simple, and that it vested in the grantor. The words used amounted to no more than a recital and a continuation of the description of the land intended to be conveyed, especially as the grantor's deed contained a covenant of general warranty.<sup>3</sup>

<sup>1</sup> *Farrall v. Hilditch*, 5 C. B. N. S. 840.      <sup>3</sup> *Whitehill v. Gotwalt*, 3 P. & W. (Pa.)

<sup>2</sup> *Farrall v. Hilditch*, 5 C. B. N. S. 840, 313.  
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## CHAPTER XVI.

### CONSIDERATION.

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#### *I. Consideration in Deeds of Bargain and Sale.*

263. At common law a feoffment was valid without any consideration, in consequence of the fealty or homage which was incident to every such conveyance. The law raised a consideration out of the tenure itself. The notion of a consideration, it is probable, first came from the court of equity, where it was held necessary to raise a use; and when conveyances to uses were introduced, the courts of law adopted the same idea, and held that a consideration was requisite in a deed of bargain and sale.<sup>1</sup> The principle that a consideration was requisite in a deed of bargain and sale was opposed by Plowden,<sup>2</sup> and by Lord Bacon in his Reading on the Statute of Uses.<sup>3</sup> "But notwithstanding this strenuous opposition," said Chief Justice Kent,<sup>4</sup> "the rule from chancery prevailed, and it has been long settled that a consideration, expressed or proved, was necessary to give effect to a deed of bargain and sale. I am not going to attempt to surmount the series of cases on this subject, though I confess myself a convert to the argument of Plowden." If the consideration be expressed, it need not be proved that it was actually paid.<sup>5</sup> "An averment

<sup>1</sup> Jackson v. Alexander, 3 Johns. 484, 492, 3 Am. Dec. 517, per Kent, C. J.; Springs v. Hanks, 5 Ired. 30.

<sup>2</sup> Sharington v. Strotton, 1 Plowd. 298, 308.

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<sup>3</sup> Bacon's Works.

<sup>4</sup> Jackson v. Alexander, 3 Johns. 484, 492, 3 Am. Dec. 517.

<sup>5</sup> Winans v. Peebles, 31 Barb. 371; Wood v. Chapin, 13 N. Y. 509.

shall not be allowed and taken against a deed, that there was no consideration given, when there is an express consideration upon the deed."<sup>1</sup> If the consideration expressed be a mere nominal one, the deed need not be supported as against the grantor or those claiming under him, or as against a stranger, by showing what consideration, or what other reason in addition to the will of the grantor, led to its execution.<sup>2</sup>

264. The doctrine that a pecuniary consideration expressed in the deed is essential to a deed of bargain and sale was adopted by some of the courts in this country in the early cases.<sup>3</sup> It was a mere form, though an essential form. Chief Justice Kent, in the case from which we have already quoted, expressing his dissent from the general rule, says: "The rule requiring a consideration to raise a use has become merely nominal and a matter of form: for if a sum of money be mentioned, it is never an inquiry whether it was actually paid, and the smallest sum possible is sufficient; nay, it has been solemnly adjudged that a peppercorn was sufficient to raise a use. Since, then, the efficacy of the rule is so completely gone, we ought, in support of deeds, to construe the cases which have modified the rule with the utmost liberality."<sup>4</sup>

Under this rule a deed "for a competent sum of money" sufficiently expressed a consideration.<sup>5</sup> So does a deed "for a certain sum of money in hand paid," without mentioning any sum;<sup>6</sup> or a deed "for value received;"<sup>7</sup> or a deed for "— dollars."<sup>8</sup>

A general consideration was not sufficient to raise a use, as where one, for "divers good considerations," bargains and sells his land.<sup>9</sup> There is too much generality in the statement.

<sup>1</sup> Shep. Touch. 510.

<sup>2</sup> Jackson v. Root, 18 Johns. 60; Rockwell v. Brown, 54 N. Y. 210.

<sup>3</sup> Jackson v. Florence, 16 Johns. 47; Jackson v. Sebring, 16 Johns. 515, 528, 8 Am. Dec. 357; Jackson v. Cadwell, 1 Cow. 622; Jackson v. Delancy, 4 Cow. 427; Jackson v. Alexander, 3 Johns. 484, 3 Am. Dec. 517; Jackson v. Root, 18 Johns. 60; Okison v. Patterson, 1 Watts & S. 395.

<sup>4</sup> Jackson v. Alexander, 3 Johns. 484, 492, 3 Am. Dec. 517.

<sup>5</sup> Fisher v. Smith, Moore, 569, case 777.

<sup>6</sup> Jackson v. Schoonmaker, 2 Johns. 230; Wortman v. Ayles, 1 Hannay, N. B. 63.

<sup>7</sup> Jackson v. Alexander, 3 Johns. 484, 492, 3 Am. Dec. 517.

<sup>8</sup> Wood v. Beach, 7 Vt. 522; Murray v. Klinzing, 64 Conn. 78, 29 Atl. Rep. 244.

<sup>9</sup> Mildmay's Case, 1 Coke, 176 a.; Bedell's Case, 7 Coke, 40 a.; Ward v. Lambert, Cro. Eliz. 394; Fisher v. Smith, Moore, 569; Rogers v. Hillhouse, 3 Conn. 398; Jackson v. Sebring, 16 Johns. 515, 8 Am. Dec. 357.

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Where the only consideration expressed was that the grantee should support the grantor, the deed was held void; for, it not being executed by the grantee, there was no binding agreement on his part, but he was given an option to furnish the support, or to let the deed become void by withholding support.<sup>1</sup>

A deed made in pursuance of a sale under a decree of court need not express any consideration.<sup>2</sup>

**265.** Following this doctrine was the doctrine that any valuable consideration paid in fact is sufficient to constitute a valid conveyance by way of bargain and sale.<sup>3</sup> "It was not necessary in a deed of bargain and sale at common law to express a consideration; but it was necessary that there should in fact be a consideration, and that the consideration should be a valuable as contradistinguished from a good one. Without a valuable consideration, the deed of bargain and sale would not raise a use; and if there were none in fact, and none expressed in the deed, and no use was declared, there was at common law a resulting trust in favor of the grantor, and the operation of the deed would be defeated."<sup>4</sup>

**266.** As between the parties to a deed at the present day, no consideration, expressed or unexpressed, is necessary.<sup>5</sup> This is the case in all States where there are statutes to the effect that all conveyances of land signed and sealed by the grantor, having good authority to convey, shall be valid to pass the same, without any other act or ceremony whatever. A deed of convey-

<sup>1</sup> *Jackson v. Florence*, 16 Johns. 47.

<sup>2</sup> *Porter v. Robinson*, 3 A. K. Marsh. 253, 13 Am. Dec. 153.

<sup>3</sup> *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Corwin v. Corwin*, 6 N. Y. 342, 57 Am. Dec. 453; *Willis v. Albertson*, 20 Abb. N. C. 263; *Jackson v. Pike*, 9 Cow. 69; *Winans v. Peebles*, 31 Barb. 371; *Maccubbin v. Cromwell*, 7 Gill & J. 157; *Cheney v. Watkins*, 1 Har. & J. 527, 2 Am. Dec. 530; *Schmitt v. Giovannari*, 43 Cal. 617; *Merle v. Mathews*, 26 Cal. 455; *Havens v. Dale*, 18 Cal. 359; *Perry v. Price*, 1 Mo. 553; *Springs v. Hanks*, 5 Ired. 30; *Okison v. Patterson*, 1 W. & S. 395; *Boardman v. Dean*, 34 Pa. St. 252; *Pennsylvania Salt Manuf. Co. v. Neel*, 54 Pa. St. 9.

<sup>4</sup> *Peck v. Vandenberg*, 30 Cal. 11, 25, per Sawyer, J.

<sup>5</sup> *Trafton v. Hawes*, 102 Mass. 533, 541, 3 Am. Rep. 494, per Wells, J.; *Beal v. Warren*, 2 Gray, 447; *Laberee v. Carlton*, 53 Me. 211; *Green v. Thomas*, 11 Me. 318; *Hatch v. Bates*, 54 Me. 136; *Hammond v. Woodman*, 41 Me. 177, 56 Am. Dec. 219; *Randall v. Ghent*, 19 Ind. 271; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *M'Neely v. Rucker*, 6 Blackf. 391; *Doe v. Hurd*, 7 Blackf. 510; *Rogers v. Hillhouse*, 3 Conn. 398; *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756; *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266.

ance, though it be wholly voluntary, operates to pass the title, as between the parties, as effectually as if it had been made for an adequate valuable consideration.<sup>1</sup>

267. A deed of conveyance under seal imports a consideration, and no consideration need in the first instance be pleaded or proved.<sup>2</sup> A stranger to the land cannot question the consideration of a deed executed under seal.<sup>3</sup>

## II. Consideration for Covenant to stand Seised.

268. A covenant to stand seised must be supported by a consideration of blood-relationship or marriage.<sup>4</sup> Such a consideration may, however, be shown, though the only consideration expressed in the deed is a valuable one.<sup>5</sup> A voluntary deed made to the donor's brothers and sisters, though expressing a nominal consideration, and though not to take effect in possession until his death, is good as a covenant to stand seised to their use.<sup>6</sup>

But affinity by marriage is not a consideration on which a covenant to stand seised can be sustained, and accordingly a covenant

<sup>1</sup> Comstock v. Son, 154 Mass. 389, 28 N. E. Rep. 296; Mather v. Corliss, 103 Mass. 568, 571; Rogers v. Hillhouse, 3 Conn. 398. Here the consideration expressed was "for divers good causes and considerations." Washband v. Washband, 27 Conn. 424; Perry v. Price, 1 Mo. 553, 14 Am. Dec. 316; Den v. Hanks, 5 Ired. 30; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Doe v. Hurd, 7 Blackf. 510.

<sup>2</sup> Trafton v. Hawes, 102 Mass. 533, 541, 3 Am. Rep. 494, per Wells, J.; Boynton v. Rees, 8 Pick. 329, 332, 19 Am. Dec. 326; Marshall v. Fisk, 6 Mass. 24; Ruth v. Ford, 9 Kans. 17; Green v. Thomas, 11 Me. 318; Doe v. Hurd, 7 Blackf. 510; Brockway v. Harrington, 82 Iowa, 23, 47 N. W. Rep. 1013; Perry v. Price, 1 Mo. 553; Saunders v. Blythe, 112 Mo. 1, 20 S. W. Rep. 319; Baker v. Westcott, 73 Tex. 129, 11 S. W. Rep. 157.

<sup>3</sup> Jones on Mortgages, § 613; West Portland Homestead Assn. v. Lawnsdale, 19 Fed. Rep. 291.

<sup>4</sup> New York: Jackson v. Sebring, 16 Johns. 515, 8 Am. Dec. 357, per Kent,

Chancellor; Rogers v. Eagle F. Co. 9 Wend. 611; Jackson v. Cadwell, 1 Cow. 622; Jackson v. Delancy, 4 Cow. 427. Massachusetts: Wallis v. Wallis, 4 Mass. 135, 3 Am. Dec. 210; Welsh v. Foster, 12 Mass. 93; Parker v. Nichols, 7 Pick. 111; Gale v. Coburn, 18 Pick. 397; Miller v. Goodwin, 8 Gray, 542. Maine: Gault v. Hall, 26 Me. 561; Marden v. Chase, 32 Me. 329; Emery v. Chase, 5 Me. 232. Maryland: Cheney v. Watkins, 1 Har. & J. 527, 532, 2 Am. Dec. 530, per Chase, C. J. New Hampshire: French v. French, 3 N. H. 234; Rollins v. Riley, 44 N. H. 9; Underwood v. Campbell, 14 N. H. 393; Bell v. Scammon, 15 N. H. 381, 41 Am. Dec. 706. Ohio: Thompson v. Thompson, 17 Ohio St. 649. South Carolina: Singleton v. Bremar, 4 McCord, 12, 17 Am. Dec. 699.

<sup>5</sup> Wallis v. Wallis, 4 Mass. 135, 3 Am. Dec. 210; Parker v. Nichols, 7 Pick. 111; Gale v. Coburn, 18 Pick. 397; Brewer v. Hardy, 22 Pick. 376, 33 Am. Dec. 747; Miller v. Goodwin, 8 Gray, 542.

<sup>6</sup> Wall v. Wall, 30 Miss. 91.

to stand seised by a father to his daughter's husband is ineffectual.<sup>1</sup>

**269. An exceptional rule prevails in Massachusetts to the effect that a valuable consideration is sufficient to support a covenant to stand seised. The requirement of a consideration of blood or marriage to support a covenant to stand seised is declared to be artificial, and wholly without reason for its existence in this country; and it is said there is no reason why such a deed should not rest upon the same consideration, or the same presumption of consideration, that will support a deed of bargain and sale. Inasmuch as in this country all deeds of land, whatever their form, are required to be recorded, there is no reason for the distinction between deeds of bargain and sale and deeds in the form of covenants to convey, so far as this distinction is founded upon the English Statute of Enrolments. "A deed of itself imports a consideration. The recital of a consideration is conclusive for the purpose of supporting the deed against the grantor and his heirs. A voluntary conveyance or gift to a stranger is good against the grantor and his heirs. It is also good against a subsequent purchaser for value, in the absence of actual fraud."<sup>2</sup> The reason for distinguishing between a deed of bargain and sale and a covenant to stand seised, on the ground of the nature of the consideration, does not exist here. Between the grantor and his heirs and the grantee, in a controversy respecting the title, there is no question open in relation to the nature or existence of the consideration, unless it be in connection with a charge of fraud in procuring the execution of the deed. It is the duty of the court to seek by construction to maintain rather than defeat the operation of the deed. In case of a deed to take effect at the decease of the grantor, it is the duty of the court, in accordance with the foregoing principles of construction, to give to the deed its intended operation, by construing it as a covenant to stand seised to the use of the grantee, according to the nature of the use granted."<sup>3</sup>**

<sup>1</sup> *Corwin v. Corwin*, 6 N. Y. 342, 57 Am. Dec. 453.

<sup>2</sup> *Beal v. Warren*, 2 Gray, 447.

<sup>3</sup> *Trafton v. Hawes*, 102 Mass. 533, 540, 3 Am. Rep. 494, per Wells, J. Professor Gray, in his *Rule against Perpetuities*, § 57, declares the Massachusetts rule to be

an error to correct an error. The first error consisted in holding that a future estate in land could not be created by a deed of bargain and sale. *Welsh v. Foster*, 12 Ma-s. 93, 96; *Parker v. Nichols*, 7 Pick. 111; *Hunt v. Hunt*, 14 Pick. 374, 380; *Brewer v. Hardy*, 22 Pick. 376. The

### III. *What is a Valuable Consideration.*

**270.** A valuable consideration is a money or property consideration, as distinguished from a good consideration founded on natural affection. Deeds made merely upon a good consideration are considered as voluntary, and may frequently be set aside in favor of the grantor's creditors and purchasers from him in good faith.<sup>1</sup> A valuable consideration may consist of anything which the parties to the deed esteem of value;<sup>2</sup> anything that is a benefit to the grantor or a damage to the grantee. It may consist of the surrender of a valuable right by the grantee to the grantor, or to another at the grantor's request.<sup>3</sup> The surrender to the grantor of the promissory note of a third person constitutes a valuable consideration.<sup>4</sup>

**271.** An agreement by the grantee to do something for the grantor is a valuable consideration, though as a matter of fact the grantee never performs the agreement. The agreement itself is a sufficient consideration.<sup>5</sup> An agreement of the grantee to pay a debt for the grantor is a valuable consideration.<sup>6</sup> So is the signing of a note as surety for the grantor.<sup>7</sup> So is the execution of a mortgage by the grantee upon the land granted, at the request of the grantor, to secure a debt due by him to a third person.<sup>8</sup>

The release by a wife of her inchoate dower interest in his lands is a valid consideration for his agreement to convey lands to her, and for his deed made in fulfilment of such agreement.<sup>9</sup>

inconvenience of this rule was done away with by the other erroneous doctrine that a covenant to stand seised may be supported by a pecuniary consideration; the court holding that a deed made upon a pecuniary consideration, when void as a deed of bargain and sale because the estate was to commence *in futuro*, might be regarded as a covenant to stand seised.

<sup>1</sup> *Clark v. Troy*, 20 Cal. 219; *Rockhill v. Spraggs*, 9 Ind. 30.

<sup>2</sup> *Charleston, C. & C. R. R. Co. v. Leech*, 33 S. C. 175, 11 S. E. Rep. 631.

<sup>3</sup> *Smith v. Westall*, 76 Tex. 509, 13 S. W. Rep. 540.

<sup>4</sup> *Swenson v. Searle* (Tex. Civ. App.), 28 S. W. Rep. 143.

<sup>5</sup> *Lake v. Gray*, 35 Iowa, 459; *Gray v. Lake*, 48 Iowa, 505; *Mobile Sav. Bk. v. McDonnell*, 89 Ala. 434, 8 So. Rep. 137; *Twomey v. Crowley*, 137 Mass. 184.

<sup>6</sup> *Buffum v. Green*, 5 N. H. 71, 20 Am. Dec. 562; *Vanmeter v. Vanmeter*, 3 Gratt. 148; *McWhorter v. Wright*, 5 Ga. 555; *Carty v. Connolly*, 91 Cal. 15, 27 Pac. Rep. 599; *Gladwin v. Garrison*, 13 Cal. 330; *Saunderson v. Broadwell*, 82 Cal. 133, 23 Pac. Rep. 36.

<sup>7</sup> *Grigsby v. Schwarz*, 82 Cal. 278, 22 Pac. Rep. 1041; *Willis v. Albertson*, 20 Abb. N. C. 263.

<sup>8</sup> *Doran v. McConlogue*, 150 Pa. St. 98, 30 W. N. C. 296, 24 Atl. Rep. 357.

<sup>9</sup> *Brown v. Rawlings*, 72 Ind. 505;

WHAT IS A VALUABLE CONSIDERATION. [§§ 272, 273.

Where a deed was executed to a car-manufacturing company in consideration of a promise by such company to locate car works thereon, parol evidence is inadmissible to show, in an action to cancel the deed, that the shops were never built, when no ground for equitable relief is shown in the circumstances surrounding the execution of the deed. The promise to build the works upon the land was a valid consideration; and though failure to comply with such promise would be a good ground for rescinding an executory agreement to convey, it is no ground for attacking the validity of an executed conveyance.<sup>1</sup>

Services rendered, or to be rendered, to the grantor by the grantee are a valuable consideration,<sup>2</sup> though there was in the beginning no contract to compensate for the services;<sup>3</sup> and though the deed very imperfectly expresses the consideration, it will pass the title.<sup>4</sup> If the grantee wholly fails to perform his agreement to render services, it has been held, contrary to the rule above stated, that the conveyance may be set aside at the instance of the grantor.<sup>5</sup>

In a conditional sale, the execution of the agreement to reconvey is a sufficient consideration for the conveyance.<sup>6</sup>

**272. A deed to indemnify an indorser or guarantor, who became such at the request of the grantor, is founded upon a valuable consideration, and vests the property in the grantee, until the grantor relieves the grantee from the liability assumed by him.<sup>7</sup>**

**273. A deed made in satisfaction of a debt due from the grantor to the grantee is based upon a valuable consideration.<sup>8</sup> A conveyance in satisfaction of illegal claims paid by the grantee at the grantor's request — such, for instance, as claims void on account of usury — is founded upon a valid and sufficient consideration.<sup>9</sup>**

*Goff v. Rogers*, 71 Ind. 459; *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec. 292.

<sup>1</sup> *Beaumont Car Works v. Beaumont Imp. Co.* (Tex. Civ. App.) 23 S. W. Rep. 274.

<sup>2</sup> *Young v. Ringo*, 1 T. B. Mon. 30.

<sup>3</sup> *Doran v. McConlogue*, 150 Pa. St. 98, 30 W. N. C. 296, 24 Atl. Rep. 357.

<sup>4</sup> *Howe v. Warnack*, 4 Bibb, 234.

<sup>5</sup> *Pironi v. Corrigan*, 47 N. J. Eq. 135, 20 Atl. Rep. 218.

<sup>6</sup> *Wilson v. Fairchild*, 45 Minn. 203, 47 N. W. Rep. 642.

<sup>7</sup> *United States v. Hooe*, 3 Cranch, 73; *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Stevens v. Bell*, 6 Mass. 339; *Buffum v. Green*, 5 N. H. 71, 20 Am. Dec. 562; *Griffith v. Frederick Co. Bank*, 6 Gill & J. 424; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Vanmeter v. Vanmeter*, 3 Gratt. 148; *Simpson v. Robert*, 35 Ga. 180.

<sup>8</sup> *Steuriiede v. Tegge* (Ky.), 14 S. W. Rep. 357.

<sup>9</sup> *Butler v. Myer*, 17 Ind. 77.



**274.** A covenant in a deed to support the grantor, or another, is a valuable consideration, and it is immaterial that the grantee does not execute it, for he is bound by the covenant by accepting the deed.<sup>1</sup> He takes the land subject to the support stipulated as a charge thereon. A parol contract to support one during life is a sufficient consideration for a deed of real estate. Such a contract is not within the statute of frauds, for the person to be supported may die within the year.<sup>2</sup>

But a conveyance for the support of the grantor is not good as against the grantor's creditors, unless he has other property sufficient to satisfy his existing debts.<sup>3</sup>

A grantee, by accepting a deed of conveyance for a consideration to be performed, such for instance as to support the grantor, becomes bound to perform his obligation, just as he would be had he become a party to an indenture in which he expressly covenanted to perform such obligation.<sup>4</sup>

**275.** A consideration may be valuable though it is not adequate. Questions in regard to the adequacy of the consideration may arise between the grantor and the grantee, or between the latter and the grantor's creditors. To enable the grantor, or any one claiming under him, to set aside a conveyance on the ground of the inadequacy of the consideration, he must make out a very strong case of imposition or undue influence;<sup>5</sup> but in a suit by the grantor's creditors, a lesser degree of inadequacy may be evidence of a secret trust between the parties to the conveyance. Great inadequacy of price may be *prima facie* evidence of the fraudulent character of the conveyance.<sup>6</sup>

<sup>1</sup> *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295. *Wisconsin*: *Scott v. Scott* (Wis.), 61 N. W. Rep. 286; *Shontz v. Brown*, 27 Pa. St. 123; *Henderson v. Hunton*, 26 Gratt. 926; *Spalding v. Hal-lenbeck*, 30 Barb. 292, distinguishing *Jackson v. Florence*, 16 Johns. 47. *West Virginia*: *Keener v. Keener*, 34 W. Va. 421, 12 S. E. Rep. 729; *McClure v. Cook* (W. Va.), 20 S. E. Rep. 612.

Otherwise in *California*: *Grimmer v. Carlton*, 93 Cal. 189, 28 Pac. Rep. 1043, 27 Am. St. Rep. 171, on the ground that such a contract cannot be specifically enforced.

<sup>2</sup> *Hutchinson v. Hutchison*, 46 Me.

154; *Green v. Thomas*, 11 Me. 318; *Vail v. McMillan*, 17 Ohio St. 617.

<sup>3</sup> *Woodward v. Wyman*, 53 Vt. 645; *Stanley v. Robbins*, 36 Vt. 422; *Briggs v. Beach*, 18 Vt. 115; *Crane v. Stickles*, 15 Vt. 252.

<sup>4</sup> *Caraway v. Caraway*, 7 Cold. (Tenn.) 245.

<sup>5</sup> *Brockway v. Harrington*, 82 Iowa, 23, 47 N. W. Rep. 1013.

<sup>6</sup> *Kuykendall v. McDonald*, 15 Mo. 416, 57 Am. Dec. 212; *Friedman v. Hirsch*, 18 N. Y. Supp. 85. In this case, the proof of actual fraud not being clear and satisfactory, the deed was allowed to stand as security for the sum paid by the grantee.

WHAT IS A VALUABLE CONSIDERATION. [§§ 276, 277.]

Mere inadequacy of consideration, when there is no fraud, affords no ground for avoiding a deed. It is enough that there is an actual consideration which is legal and of some value.<sup>1</sup>

**276. A consideration may be meritorious though not valuable.** A moral duty to do anything is a meritorious consideration. It is a nullity in law, and is an imperfect consideration in equity, though recognized by it as effective within very narrow limits. "While this species of consideration does not render an agreement enforceable against the promisor himself, nor against any one in whose favor he has altered his original intention, yet if an intended gift based upon such meritorious consideration has been partially and imperfectly executed or carried into effect by the donor, and if his original intention remains unaltered at his death, then equity will, within certain narrow limits, enforce the promise thus imperfectly performed, as against a third person, claiming merely by operation of law, who has no equally meritorious foundation for his claim. The equity, thus described as based upon a meritorious consideration, only extends to cases involving the duties either of charity, of paying creditors, or of maintaining a wife and children."<sup>2</sup>

The benefits received in the way of religious instruction and consolation, by one who attends regularly upon the ministrations of a religious society, form a meritorious consideration for a conveyance of land by such attendant to the society which will induce a court of equity to cure a defect in the conveyance.<sup>3</sup>

**277. A good consideration** is usually applied to a consideration that is not a valuable one, and imports a consideration founded on blood-relationship or natural affection. A deed for such a consideration is a voluntary one, while a deed for a valuable consideration is termed compensatory. The term "good consideration" is sometimes loosely used to denote any consideration valid in law, whether valuable or meritorious;<sup>4</sup> but technically it should always denote a meritorious consideration.

On this point see, also, *Dunn v. Chambers*, 4 Barb. 376; *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Washband v. Washband*, 27 Conn. 424.

<sup>1</sup> *Goodspeed v. Fuller*, 46 Me. 141.

<sup>2</sup> 2 Pomeroy Eq. Jur. § 588. For cases where equity has lent its aid to cure defects in conveyances to charitable uses,

see *Attorney-General v. Tancred*, 1 Eden, 10, 1 Amb. 351, and 1 Wm. Bl. 90; *Innis v. Sayer*, 7 Hare, 377, 3 Macn. & G. 606.

<sup>3</sup> *Methodist E. Church v. Town*, 47 N. J. Eq. 400, 20 Atl. Rep. 488.

<sup>4</sup> As in the statutes of 27 Eliz. ch. 4, relating to fraudulent conveyances. *Copis v. Middleton*, 2 Madd. 410; *Doe v. Rout-*

A good as distinguished from a valuable consideration is not sufficient to support the covenants of a deed.<sup>1</sup>

A deed by a father for the benefit of his illegitimate child is upon a good consideration which will support the conveyance.<sup>2</sup>

**278. A deed in consideration of past or future illicit intercourse passes the legal title, and, the grantee being in possession, neither the grantor nor his heirs can recover in ejectment.<sup>3</sup>** But such a conveyance is not founded upon either a valuable or good consideration, and is, as against the grantor's creditors, a voluntary conveyance.<sup>4</sup> A conveyance, however, not looking to past or future cohabitation as a consideration, but founded upon a legal and moral obligation to support his children born of the grantee, may be held valid as against the grantor's creditors. It was so held in a case where the grantee had been deceived into a marriage with the grantor<sup>5</sup> when he already had a wife living and had had children by him; and also in a case where a woman had been the grantor's mistress and had had children by him.<sup>6</sup> In such cases there is either a legal or moral obligation upon the grantor to indemnify the woman for the support of his children.<sup>7</sup>

**279. Love and affection for a blood relation is not a valuable consideration.<sup>8</sup>** A deed for such a consideration is purely a voluntary one. Such a consideration is called meritorious; but while it makes the conveyance good between the parties, it is void as against the grantor's creditors under the same circumstances that would render any voluntary conveyance void as against them. An executory covenant, such as a covenant by a grantee to pay an existing mortgage upon the property, contained in a deed by

ledge, 2 Cowp. 705; *Hodgson v. Butts*, 3 Cranch, 140; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. Rep. 482.

<sup>1</sup> *Wilbur v. Warren*, 104 N. Y. 192, 10 N. E. Rep. 263. *Contra*, *Hanson v. Buckner*, 4 Dana, 251, 29 Am. Dec. 401.

<sup>2</sup> *Marchioness of Annandale v. Harris*, 2 P. Wms. 432; *Jennings v. Brown*, 9 M. & W. 496; *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. Rep. 1001; *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. Rep. 456; *Hook v. Pratt*, 78 N. Y. 371; *Bunn v. Winthrop*, 1 Johns. Ch. 329.

<sup>3</sup> *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48.

<sup>4</sup> *Potter v. Gracie*, 38 Ala. 303, 29 Am. Rep. 748; *Jackson v. Miner*, 101 Ill. 550.

<sup>5</sup> *Fellows v. Emperor*, 13 Barb. 92, 97.

<sup>6</sup> *Wait v. Day*, 4 Den. 439. *Contra*, *Potter v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748.

<sup>7</sup> *Wait v. Day*, 4 Den. 439.

<sup>8</sup> *Mathews v. Feaver*, 1 Cox's Eq. Cas. 278; *Hinde v. Longworth*, 11 Wheat. 199; *Borum v. King*, 37 Ala. 606; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. Rep. 54; *Beith v. Beith*, 76 Iowa, 601, 41 N. W. Rep. 371; *Burton v. Le Roy*, 5 Sawyer, 510, where the deed was to a son-in-law.

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a father to his daughter, not supported by any valuable or pecuniary consideration, cannot be supported either in law or equity.<sup>1</sup>

IV. *Marriage is a Valuable Consideration.*

**280. Marriage is deemed in law a valuable consideration.**<sup>2</sup> A conveyance for such a consideration stands upon a different footing from a voluntary conveyance. A man may convey a portion of his property to his intended wife, if this is no more than a suitable provision for her, and, in the absence of fraud on the part of the parties to the settlement, it will be upheld against existing as well as subsequent creditors.<sup>3</sup> "In determining whether or not the settlement was made in good faith, the value of the property conveyed, the amount of the settler's debts, and the value of his remaining property as compared therewith, would of course be important considerations. A presumption of fraud, more or less conclusive, would arise in proportion as the property conveyed was, or was not, in excess of a reasonable provision, and as the settler's remaining property was sufficient, or insufficient, for the payment of his debts."<sup>4</sup> The presumption, until some evidence of fraud is shown, is that the conveyance is valid, and not a fraud upon the rights of any one.<sup>5</sup>

Marriage may be given in evidence as the consideration of a deed expressed to be for a money consideration only.<sup>6</sup>

**281. A settlement in contemplation of marriage will not be set aside except upon clear proof of fraud participated in by**

<sup>1</sup> *Wilbur v. Warren*, 104 N. Y. 192, 10 N. E. Rep. 263; *Whitaker v. Whitaker*, 52 N. Y. 368.

<sup>2</sup> *Nairn v. Prowse*, 6 Ves. Jr. 752; *Smith v. Allen*, 5 Allen, 454, 81 Am. Dec. 758; *Bonser v. Miller*, 5 Oreg. 110; *Cains v. Jones*, 5 Yerg. 249; *Betts v. Union Bank*, 1 Har. & G. 175, 18 Am. Dec. 283; *Gibson v. Bennett*, 79 Me. 302, 9 Atl. Rep. 727; *Tolman v. Ward (Me.)*, 29 Atl. Rep. 1081.

<sup>3</sup> *Campion v. Cotton*, 17 Ves. Jr. 264, 271; *National Exchange Bank v. Watson*, 13 R. I. 91, 43 Am. Rep. 132; *Smith v. Allen*, 5 Allen, 454, 81 Am. Dec. 758; *Marshall v. Morris*, 16 Ga. 368; *Corwin v. Corwin*, 6 N. Y. 342, 57 Am. Dec. 453, per *Johnson, J.*

<sup>4</sup> *National Exchange Bank v. Watson*,

13 R. I. 91, 96, 43 Am. Rep. 132, per *Matteson, J.*

<sup>5</sup> *Frazer v. Western*, 1 Barb. Ch. 220; *Dygert v. Remerschnider*, 32 N. Y. 629; *Bonser v. Miller*, 5 Oreg. 110.

<sup>6</sup> *Tolman v. Ward (Me.)*, 29 Atl. Rep. 1081. A decision to the contrary is *Betts v. Union Bank*, 1 Har. & G. 175. But it was remarked by *Walton, J.*, in *Tolman v. Ward, supra*, that "the decision does not rest on the consideration of marriage alone. It applies to all considerations in conflict with the one expressed in the deed. And there are other decisions in which the doctrine is maintained that the expressed consideration in a deed cannot be varied or contradicted by oral evidence. But in this State, and in most of the States, the law is otherwise."

both parties. The wife is a purchaser of the property settled upon her in anticipation of marriage, and she is entitled to hold it as against all persons claiming under the grantor.<sup>1</sup> Even if the grantor made the ante-nuptial settlement with the intent to defraud his creditors, it will be sustained, in absence of proof that the grantee participated in the fraud.<sup>2</sup> "I never knew an instance," said the Lord Chancellor in *Barrow v. Barrow*,<sup>3</sup> "where a settlement in consideration of marriage hath been set aside, and I will not make a precedent for it." There are more recent cases in which marriage settlements have been declared void as to creditors.<sup>4</sup>

Where the grantee was not aware, at the time of the execution of a deed to her in consideration of her marriage to the grantor, of any intent on his part to defraud his creditors, the fact that she became aware of such fraudulent intent before the marriage took place is not sufficient to avoid the deed, as the consideration for the deed is the agreement to marry, and not its actual consummation.<sup>5</sup>

Marriage is a consideration of the highest value, and a deed or

<sup>1</sup> *Ex parte* McBurnie, 1 De G., M. & G. 440; *Sterry v. Arden*, 1 Johns. Ch. 261; *Verplank v. Sterry*, 12 Johns. 536, 7 Am. Dec. 348; *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 405; *Jones's* App. 62 Pa. St. 324; *Bunell v. Witherow*, 29 Ind. 128.

In *Magniac v. Thompson*, 7 Pet. 348, Mr. Justice Story, delivering the opinion of the whole court, said: "Nothing can be clearer, both upon principle and authority, than the doctrine that, to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it."

<sup>2</sup> *Prewit v. Wilson*, 103 U. S. 22; *Magniac v. Thompson*, 7 Pet. 348, 393; *Frank's* Appeal, 59 Pa. St. 190; *Wright v. Wright*, 59 Barb. 505, affirmed 54 N. Y. 437; *Bonserv v. Miller*, 5 Oreg. 110; *Andrews v. Jones*, 10 Ala. 400; *Tolman v. Ward* (Me.), 29 Atl. Rep. 1081; *Prignon v.*

*Dausset*, 4 Wash. St. 199, 29 Pac. Rep. 1046.

<sup>3</sup> 2 Dickens, 504, 506 (1774). To like effect Sir Samuel Romilly and Mr. Bell, counsel for defendants in *Campion v. Cotton*, 17 Ves. Jr. 264, 267 (1810), declared: "There is no decision to be found in which a settlement previous to, and in contemplation of, marriage has been considered as fraudulent against creditors. That a case strong enough for that purpose might exist cannot be denied, as if the wife was clearly a party and the marriage a more secure mode of defrauding the creditors, but no such decision has been yet made. The wife must be clearly proved to have had knowledge that a fraud upon creditors was intended."

<sup>4</sup> *Fraser v. Thompson*, 4 De G. & J. 659. In this case, before the execution of the settlement, the grantor had, to the knowledge of the intended wife, committed acts of bankruptcy.

<sup>5</sup> *Prignon v. Dausset*, 4 Wash. St. 199, 29 Pac. Rep. 1046.

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settlement on this consideration is upheld with a steady resolution from motives of the soundest policy.<sup>1</sup> One reason why the courts are averse to annulling an ante-nuptial settlement is, that there can be no dissolution of the marriage which was the consideration for it.<sup>2</sup> The parties cannot be placed in the condition they were in before the marriage, or even before the execution of the deed prior to the marriage.<sup>3</sup>

**282. A legal contract or promise of marriage is a valuable consideration, and justifies the grantee in holding the property conveyed against subsequent purchasers, or creditors of the grantor, although the marriage is prevented by the death of the grantor.<sup>4</sup> If a deed to an intended wife be expressed to be "in consideration of the promise of the said party of the second part to marry" the grantor, an objection that the promise was not in writing is without force, since the grantee is bound by the recitals in the deed.<sup>5</sup>**

**283. The subsequent marriage of a grantee may change a voluntary conveyance to a conveyance on a valuable consideration. Thus where a father makes a settlement upon his daughter, and she subsequently marries a man who has knowledge of the settlement, the character of the settlement is changed by the marriage, and the grantee becomes a purchaser for a valuable**

<sup>1</sup> *Prewitt v. Wilson*, 103 U. S. 22, per Field, J.; *Magniac v. Thompson*, 7 Pet. 348, 393, per Story, J.; *Prignon v. Daus-sat*, 4 Wash. St. 199, 29 Pac. Rep. 1046.

<sup>2</sup> *Jones' App.* 62 Pa. St. 324; *Smith v. Allen*, 5 Allen, 454, 81 Am. Dec. 758.

<sup>3</sup> *Prignon v. Daus-sat*, 4 Wash. St. 199, 29 Pac. Rep. 1046.

<sup>4</sup> *Smith v. Allen*, 5 Allen, 454, 81 Am. Dec. 758. "In reference to the question of the sufficiency and value of the consideration, and consequently of the validity of the title acquired by the conveyance, there does not appear to be any real and substantial distinction between a marriage formally solemnized and a binding and obligatory agreement, which has been fairly and truly and above all suspicion of collusion made, to form such connection and enter into that relation. All the consequences of a legal obligation accompany such an agreement. The law enforces its

performance by affording an effectual remedy against the party who shall without legal excuse fail to fulfil it. But a contract of this kind is not to be regarded as a valuable consideration, merely because damages commensurate with the injury may be recovered of the party who inexcusably refuses to fulfil it. It is peculiar in its character, and has other effects and consequences attending it. It essentially changes the rights, duties, and privileges of the parties." See *Conner v. Stanley*, 65 Cal. 183, where it was held that a written contract in view of marriage, providing for a transfer of certain corporate bonds to intended wife, could not be avoided by the man's refusal to fulfil his agreement of marriage. Also, *Tolman v. Ward (Me.)*, 29 Atl. Rep. 1081.

<sup>5</sup> *Prignon v. Daus-sat*, 4 Wash. St. 199, 29 Pac. Rep. 1046.

consideration. It does not matter that no particular marriage was in contemplation at the time of the voluntary conveyance. When the subsequent marriage occurred, it is to be presumed that the settlement was one probable inducement to the marriage.<sup>1</sup> It may not even be material to prove that the marriage was made with notice of the settlement, as knowledge of the circumstances of the party is to be presumed.<sup>2</sup>

A marriage solemnized subsequently to a conveyance to a woman, which is otherwise merely voluntary, makes the conveyance indefeasible, though nothing was said by the parties concerning the consideration for the conveyance, either at the time of the solemnization of the marriage, or in the negotiation which preceded it. The law presumes that the property conveyed constituted some part of the consideration which induced the grantee to marry.<sup>3</sup> Parol evidence may be given that a conveyance was made in consideration of a marriage contract, although the deed does not mention it.<sup>4</sup>

**284. A conveyance through a third person by a husband to his wife, in pursuance of an oral agreement made before marriage, is upon a valuable consideration.**<sup>5</sup> Even in the absence of such an agreement, a conveyance by a husband to his wife, in payment of an equitable indebtedness from him to her, is not voluntary. Such a conveyance, made by way of a settlement upon the wife after marriage without a previous agreement therefor, is a valid voluntary conveyance, if the husband was free from debt, or had other property sufficient to pay all his debts at the time of such conveyance.<sup>6</sup> But such a conveyance is invalid as against existing creditors;<sup>7</sup> and it is equally invalid although made in pursuance of an agreement between the husband and wife after marriage, whereby he was to compensate her for services in the care of his invalid mother.<sup>8</sup>

<sup>1</sup> *Prodgers v. Langham*, 1 Sid. 133; 176; *Bentley v. Harris*, 2 Gratt. 357; *Herring v. Wickham*, 29 Gratt. 628, 637, 26 *Am. Rep.* 405, per Staples, J.

<sup>2</sup> *Brown v. Carter*, 5 Ves. 862, 877, per Lord Alvanly.

<sup>3</sup> *Sterry v. Arden*, 1 Johns. Ch. 261; *Dygert v. Remerschnider*, 32 N. Y. 629; *Smith v. Allen*, 5 Allen, 454, 81 *Am. Dec.* 758; *Huston v. Cantril*, 11 Leigh, 136,

<sup>4</sup> *Eppes v. Randolph*, 2 Call, 103.

<sup>5</sup> *Dygert v. Remerschnider*, 32 N. Y. 629; *Babcock v. Eckler*, 24 N. Y. 623.

<sup>6</sup> *Barker v. Koneman*, 13 Cal. 9.

<sup>7</sup> *Beecher v. Clark*, 12 Blatchf. 256.

<sup>8</sup> *Coleman v. Burr*, 93 N. Y. 17, 45 *Am. Rep.* 160.

*V. Antecedent Debt as a Valuable Consideration.*

**285.** Whether an antecedent debt is a valuable consideration is a question upon which the courts of the different States are not in accord.<sup>1</sup> A distinction has sometimes been taken between a conveyance in complete satisfaction and discharge of an antecedent debt, and a conveyance or mortgage as security for an antecedent debt; the antecedent debt being regarded as a valuable consideration for a conveyance in extinction of the debt, but not for a conveyance in security of it;<sup>2</sup> for in the latter case

<sup>1</sup> A preëxisting debt a valuable consideration for an absolute conveyance or mortgage: *Lawrence v. Tucker*, 23 How. 14; *Conrad v. Atl. Ins. Co.* 1 Pet. 386, 448; *Shirras v. Caig*, 7 Cranch, 34. **California**: *Frey v. Clifford*, 44 Cal. 335; *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318; *Robinson v. Smith*, 14 Cal. 94; *Naglee v. Lyman*, 14 Cal. 450. **Illinois**: *Partridge v. Smith*, 2 Biss. 183; *Doolittle v. Cook*, 75 Ill. 354; *Manning v. McClure*, 36 Ill. 490. **Indiana**: *Work v. Brayton*, 5 Ind. 396; *Wright v. Bundy*, 11 Ind. 398; *Aiken v. Bruen*, 21 Ind. 137; *Babcock v. Jordan*, 24 Ind. 14; *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *Wert v. Naylor*, 93 Ind. 431. Otherwise in case of a mortgage to secure a preëxisting debt. *First Nat. Bank v. Conn. Mut. L. Ins. Co.* 129 Ind. 241, 28 N. E. Rep. 695. **Kansas**: *Ruth v. Ford*, 9 Kans. 17; *Jackson v. Reid*, 30 Kans. 10, 1 Pac. Rep. 308; *Haynes v. Eberhardt*, 37 Kans. 308, 15 Pac. Rep. 168. **Maryland**: *Busey v. Reese*, 38 Md. 264; *Cecil Bank v. Heald*, 25 Md. 562. **Mississippi**: *Love v. Taylor*, 26 Miss. 567; *Soule v. Shotwell*, 52 Miss. 236. See *Boon v. Barnes*, 23 Miss. 136. **Missouri**: *Knox v. Hunt*, 18 Mo. 174. **Pennsylvania**: *Cummings v. Boyd*, 83 Pa. St. 372; *Royer v. Keystone Nat. Bank*, 83 Pa. St. 248. **Wisconsin**: *Heath v. Silverthorn, &c. Co.* 39 Wis. 146.

Preëxisting debt not a valuable consideration for a conveyance or mortgage: **Alabama**: *Jones v. Robinson*, 77 Ala. 499; *Wells v. Morrow*, 38 Ala. 125; *Thurman v. Stoddard*, 63 Ala. 336; *Short v. Battle*,

52 Ala. 456; *Alexander v. Caldwell*, 55 Ala. 517; *Craft v. Russell*, 67 Ala. 9; *Sweeney v. Bixler*, 69 Ala. 539. **Delaware**: *Lockwood v. Bates*, 1 Del. Ch. 435. **Iowa**: *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. Rep. 243; *Phelps v. Fockler*, 61 Iowa, 340, 14 N. W. Rep. 729, 16 N. W. Rep. 210. **Michigan**: *Boxheimer v. Gunn*, 24 Mich. 372; *Edwards v. McKernan*, 55 Mich. 520, 523, 22 N. W. Rep. 20. **New Jersey**: *Mingus v. Condit*, 23 N. J. Eq. 313; *Pancoast v. Duval*, 26 N. J. Eq. 445; *Wheeler v. Kirtland*, 24 N. J. Eq. 552. **New York**: *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528; *Padget v. Lawrence*, 10 Paige, 170, 40 Am. Dec. 232; *Wood v. Robinson*, 22 N. Y. 564; *Weaver v. Barden*, 49 N. Y. 286; *Cary v. White*, 52 N. Y. 138; *De Lancey v. Stearns*, 66 N. Y. 157; *Moore v. Ryder*, 65 N. Y. 438. See, however, *Seymour v. Wilson*, 19 N. Y. 417. **Pennsylvania**: *Ash-ton's App.* 73 Pa. St. 153. **South Carolina**: *Zorn v. Railroad Co.* 5 S. C. 90. **Tennessee**: *Lane v. Logue*, 12 Lea, 681, 684. **Texas**: *Spurlock v. Sullivan*, 36 Tex. 511; *Steffian v. Bank*, 69 Tex. 513, 6 S. W. Rep. 823; *Overstreet v. Manning*, 67 Tex. 657, 660, 4 S. W. Rep. 248; *Golson v. Fielder* (Tex. Civ. App.), 21 S. W. Rep. 173; *Swenson v. Seale* (Tex. Civ. App.), 28 S. W. Rep. 143.

<sup>2</sup> 2 *Pomeroy's Eq. Juris.* §§ 748, 749; *Morse v. Godfrey*, 3 Story, 364, 390, per Story, J.; *Wert v. Naylor*, 93 Ind. 431, 434. Mr. Pomeroy, upon a review of the cases, is of opinion that the weight of authority is in favor of the doctrine that the



something is given up, but one who merely takes a conveyance or mortgage as security for a debt gives up nothing. A mortgage to secure an antecedent debt is of course valid between the parties, and can be disputed only by purchasers from the grantor and his creditors.<sup>1</sup> An extension of the times of payment of a preëxisting debt is a valuable consideration, and makes a mortgagee a *bona fide* purchaser for value.<sup>2</sup> The surrender of any right or security at the time of taking a mortgage for a preëxisting debt makes the mortgagee a purchaser for value.<sup>3</sup>

**286.** The rule that a preëxisting debt does not constitute one a *bona fide* purchaser is by some courts never applied where the property is purchased in good faith from the real and exclusive owner, but only where the property is purchased from some person who is apparently the owner, but who is not in fact, or not in law or equity, the real owner.<sup>4</sup>

Under this rule a conveyance to a surety in consideration that he had a few days before become a surety for a person other than the grantor is a conveyance for a consideration that had passed before the execution of the deed, and does not constitute the grantee a *bona fide* purchaser.<sup>5</sup>

**287.** As between the immediate parties, the payment of a preëxisting debt due from one to the other is as valuable a consideration to support a contract as though the amount was then for the first time advanced.<sup>6</sup> And so a mortgage to secure an

surrender of a precedent debt, in consideration of a conveyance, makes the grantee a *bona fide* purchaser even as against prior equities; but that the weight of authority supports the doctrine that a mortgage to secure a preëxisting debt does not make the mortgagee a *bona fide* purchaser for a valuable consideration.

<sup>1</sup> *Steiner v. McCall*, 61 Ala. 406; *Turner v. McFee*, 61 Ala. 468.

<sup>2</sup> *Cary v. White*, 52 N. Y. 138; *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. Rep. 243; *Jones v. Robinson*, 77 Ala. 499; *Sullivan Sav. Inst. v. Young*, 55 Iowa, 132, 7 N. W. Rep. 480. See *Jones on Mortgages*, § 459.

<sup>3</sup> *Lane v. Logue*, 12 Lea, 681.

<sup>4</sup> *Ruth v. Ford*, 9 Kans. 17.

<sup>5</sup> *Willis v. Albertson*, 20 Abb. N. C. 263.

<sup>6</sup> *Alstin v. Cundiff*, 52 Tex. 453. This was a case where the holder of an unrecorded instrument sought, after a long lapse of time, to prevail over a purchaser for the consideration of an antecedent indebtedness. The court say: "There was no offer to refund this indebtedness, and on evidence that, in respect to their collection, the creditors, from want of the bar of limitations, insolvency of the debtors, or other good cause, particularly after so long a lapse of time, could be placed in as good condition as before the execution of the deeds. . . . Under these circumstances it would seem but reasonable and equitable that, before she (the one relying upon the unrecorded instrument) should prevail, it should be shown that if the deed were set aside because the consideration was a preëxisting debt, *Alstin*

antecedent debt is perfectly valid as between the parties, whatever may be its effect as to purchasers or incumbrancers.<sup>1</sup>

## VI. *Voluntary Conveyances.*

**288.** A voluntary conveyance is one wholly without a valuable consideration,<sup>2</sup> or for a valuable consideration which is merely a nominal one.<sup>3</sup>

A deed which expresses a mere nominal consideration, but is founded upon an agreement for a subsequent valuable consideration, such as an agreement to pay a debt of the grantor, which is subsequently performed in good faith, is not a voluntary conveyance, and will be upheld as against the grantor's heirs.<sup>4</sup>

A voluntary conveyance confers a title good against the grantor and his heirs, and as against subsequent creditors of the grantor and purchasers from him, provided the grantor made the conveyance without intent to defraud.<sup>5</sup> A mortgage may be made by way of a gift when the rights of creditors are not interfered with.<sup>6</sup>

It is only as against the rights of existing creditors of the grantor that his voluntary conveyance is invalid.<sup>7</sup>

**289.** A voluntary conveyance is presumptively fraudulent as to existing creditors.<sup>8</sup> The want of a valuable consideration throws upon the grantee, in defence of his title, the burden of disproving any fraudulent intent in the grantor to defraud his creditors. If the conveyance was made with a fraudulent intent on the part of the grantor, it is void both as to prior and subsequent creditors, whether the grantee participated in the fraud or not.<sup>9</sup>

(the creditor) would not be prejudiced in the collection otherwise of this indebtedness." This was approved in *Dunlap v. Green*, 60 Fed. Rep. 242.

<sup>1</sup> *Steiner v. McCall*, 61 Ala. 406; *Turner v. McFee*, 61 Ala. 468.

<sup>2</sup> *Seward v. Jackson*, 8 Cow. 406, 430; *Washband v. Washband*, 27 Conn. 424.

<sup>3</sup> *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756.

<sup>4</sup> *Young v. Young*, 27 S. C. 201, 3 S. E. Rep. 202.

<sup>5</sup> *Gale v. Gould*, 40 Mich. 515; *Keeler v. Ullrich*, 32 Mich. 88; *Page v. Kendrick*, 10 Mich. 300; *Stafford v. Stafford*, 41 Tex. 111.

<sup>6</sup> *Jones on Mortgages*, 614.

<sup>7</sup> *Jones v. Clifton*, 101 U. S. 225.

<sup>8</sup> *Lloyd v. Fulton*, 91 U. S. 479, 485; *Beecher v. Clark*, 12 Blatchf. 256; *Laughton v. Harden*, 68 Me. 208, 213; *Carter v. Grimshaw*, 49 N. H. 100; *Hitchcock v. Kiely*, 41 Conn. 611; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756.

<sup>9</sup> *Beecher v. Clark*, 12 Blatchf. 256; *Hitchcock v. Kiely*, 41 Conn. 611; *Carter v. Grimshaw*, 49 N. H. 100; *Coolidge v. Melvin*, 42 N. H. 510, 534; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733;

"Where the purpose of the grantor is shown to have been actually fraudulent as to creditors, it is sufficient to prove that the grantee takes without consideration, without proving otherwise his participation in the fraudulent intent."<sup>1</sup>

In New York a conveyance is not necessarily or even presumptively fraudulent because it is voluntary.<sup>2</sup> The mere fact that the grantor was indebted at the time of the conveyance does not render a voluntary conveyance absolutely fraudulent and void in law. If there was no intention on the part of the grantor to delay or defraud his creditors, and he has, aside from the property conveyed, property sufficient to pay all his debts, though it afterwards happens that he does not in fact pay his debts existing at the time of such conveyance, the voluntary conveyance will be sustained.

**290. Generally subsequent creditors of the grantor cannot question a voluntary conveyance, or one made upon an inadequate consideration.<sup>3</sup>** Subsequent creditors deal with the grantor and give him credit, relying only upon the property he has at the time of their transactions with him. It is only upon proof that the grantor disposed of his property with intent to defraud those to whom he might soon afterwards become indebted that his subsequent creditors can question his voluntary conveyance. But if the conveyance was made by the grantor with the intent to defraud his subsequent creditors, it is void, although the grantee did not participate in or know of such intent.<sup>4</sup> In the absence of proof of such intent, subsequent creditors have no better right than subsequent purchasers to question the debtor's voluntary conveyance.<sup>5</sup>

*Lassiter v. Davis*, 64 N. C. 498; *Foley v. Bitter*, 34 Md. 646.

<sup>1</sup> *Clark v. Chamberlain*, 13 Allen, 257, 260, per Hoar, J.

<sup>2</sup> *Van Wyck v. Seward*, 6 Paige, 62; *Jackson v. Post*, 15 Wend. 588; *Phillips v. Wooster*, 36 N. Y. 412; *Fox v. Moyer*, 54 N. Y. 125; *Dunlap v. Hawkins*, 59 N. Y. 342; *Holden v. Burnham*, 63 N. Y. 74; *Babcock v. Eckler*, 24 N. Y. 623; *Dygert v. Remerschnider*, 32 N. Y. 629.

It was so determined in New York before the statute. *Seward v. Jackson*, 8 Cow. 406.

<sup>3</sup> *Graham v. Railroad Co.* 102 U. S. 148; *Shaw v. Tracy*, 83 Mo. 224, 229, per Ray,

J.; *Hatch v. Bates*, 54 Me. 136; *Pomeroy v. Bailey*, 43 N. H. 118.

<sup>4</sup> *Sexton v. Wheaton*, 8 Wheat. 229; *Mattingly v. Nye*, 8 Wall. 370; *Panil v. Murphree*, 13 How. 92; *Beecher v. Clark*, 12 Blatchf. 256; *Laughton v. Harden*, 68 Me. 208; *Savage v. Murphy*, 34 N. Y. 508, 8 Bosw. 75, 90 Am. Dec. 733.

<sup>5</sup> *French v. Shotwell*, 5 Johns. Ch. 555, 20 Johns. 668. Such creditors cannot avoid the conveyance even if the debtor assigns to them his supposed right of avoidance. *Prosser v. Edmonds*, 1 Y. & C. 481; *Crocker v. Belangee*, 6 Wis. 645, 70 Am. Dec. 489; *Milwaukee & M. R. R. Co. v. Milwaukee & W. R. R. Co.* 20 Wis.

**291. Fraudulent intent on the part of the grantor may be inferred where he continues in possession after a voluntary conveyance, and he pays existing debts by contracting new debts. The fraud consists in a design to obtain credit by means of the possession and apparent ownership of the property conveyed. If the existing indebtedness is merely transferred, not paid, the fraud is as palpable as it would be if the debts contracted after the conveyance were owing to the same creditors who held them at the time of the conveyance.<sup>1</sup>**

A purchaser from one who holds under a voluntary conveyance is not bound to inquire whether such conveyance was fraudulent, although he has notice that it was not founded upon a pecuniary consideration. He has a right to act upon the legal presumption that the voluntary conveyance was honestly made, unless some other fact is brought to his knowledge to raise a suspicion in his mind that the conveyance was intended to defraud some one.<sup>2</sup>

But if the grantee paid a valuable consideration, the conveyance is good notwithstanding the intent of the grantor to defraud, unless the grantee also participated in the fraudulent intent.<sup>3</sup>

**292. A conveyance is not voluntary where a money consideration, however small, is actually paid.<sup>4</sup> Thus a conveyance by a father to his daughter, in consideration of one dollar actually paid, and natural love and affection, is not a voluntary conveyance.<sup>5</sup> Inadequacy of consideration may be shown in evidence as affecting the question of fraud, but it does not render the conveyance a voluntary one.<sup>6</sup>**

174, 88 Am. Dec. 740. But they may convey the same property to another for the purpose of his disputing the validity of the prior conveyance, and give him the right to sue. *Dickinson v. Burrell*, L. R. 1 Eq. 337; *McMahon v. Allen*, 35 N. Y. 403; *Graham v. Railroad Co.* 102 U. S. 148, 158, per Bradley, J.

<sup>1</sup> *Savage v. Murphy*, 34 N. Y. 508, 8 Bosw. 75, 90 Am. Dec. 733.

<sup>2</sup> *Frazer v. Western*, 1 Barb. Ch. 220.

<sup>3</sup> *Prewitt v. Wilson*, 103 U. S. 22; *Lassiter v. Davis*, 64 N. C. 498; *Devries v. Phillips*, 63 N. C. 53; *Brown v. Rawlings*, 72 Ind. 505.

<sup>4</sup> *Washband v. Washband*, 27 Conn. 424.

<sup>5</sup> *Ferguson's App. (Pa.)* 11 Atl. Rep. 885; *Scott v. Scott*, 1 Mass. 527. In *Hattersley v. Bissett* (N. J. Eq.), 25 Atl. Rep. 332, it is said that the presumption is that an advancement was intended; but such presumption may be overcome by parol testimony showing the intention to be to make a gift. And see *Murrell v. Murrell*, 2 Strob. Eq. 148.

<sup>6</sup> *Washband v. Washband*, 27 Conn. 424; *Brockway v. Harrington*, 82 Iowa, 23, 47 N. W. Rep. 1013; *Rankin v. Wallace* (Ky.), 14 S. W. Rep. 79.

See, *contra*, *Kinnebrew v. Kinnebrew*, 35 Ala. 628.

To show that a deed was voluntary and fraudulent, evidence is admissible that the consideration named in the deed was not in fact paid,<sup>1</sup> or that the consideration paid was inadequate.<sup>2</sup>

293. A voluntary conveyance is good against subsequent purchasers from the grantor for a valuable consideration without notice of such prior conveyance.<sup>3</sup> The English rule, however, is that a voluntary conveyance is void as against subsequent *bona fide* purchasers for a valuable consideration, even with notice of such conveyance.<sup>4</sup> The English cases go upon the ground that such subsequent conveyance of itself shows the fraudulent intent in making the voluntary conveyance. This presumption of fraud cannot be contradicted. The question arises upon the construction of the statute of 27 Eliz. ch. 4, § 2, which proves that every conveyance, "for the intent of and purpose to defraud and deceive" such person or persons as shall afterwards purchase in fee simple the same lands, shall be deemed and taken as against such person or persons and all others claiming under them to be utterly void and of no effect. This statute is in affirmance of the common law. Though this statute is in force in Massachusetts and other of the older States as a part of the common law, there was no settled construction of it at the time of the separation of the colonies from the mother country, nor indeed before the famous decision of Lord Ellenborough in 1807,<sup>4</sup> and our courts were therefore free to make their own construction of the statute.

<sup>1</sup> Kerr v. Birnie, 25 Ark. 225.

<sup>2</sup> Mobile Sav. Bank v. McDonnell, 89 Ala. 434, 8 So. Rep. 137.

<sup>3</sup> Beal v. Warren, 2 Gray, 447; Trafton v. Hawes, 102 Mass. 533, 540.

<sup>4</sup> Doe v. Manning, 9 East, 59 (1807); Doe v. Rusham, 17 Q. B. 723, per Lord Campbell, C. J.; Evelyn v. Templar, 2 Bro. C. C. 148 (1787).

Some of the English judges have not liked the English rule, and have supported it only because it had become well settled. Thus Lord Thurlow, in Evelyn v. Templar, 2 Bro. C. C. 148 (1787), said: "Although it would have been as well at first if the voluntary covenant had not been thought so little of, yet the rule was such, and so many estates stand upon it, that it cannot be shaken." And Sir William Grant, in Buckle v. Mitchell, 18 Ves. 100

(1812), said: "I have great difficulty to persuade myself that the words of the statute warranted, or that the purpose of it required, such a construction. . . . But it is essential to the security of property that the rule should be adhered to when settled." See, also, expressions of regret as to the rule by Lord Eldon in Pulvertoft v. Pulvertoft, 18 Ves. 84; by Lord Campbell in Doe v. Rusham, 17 Q. B. 723; by Jessel, M. R., in *Ex parte* Hillman, 10 Ch. D. 622. In this country the English rule was in some early cases supposed to have been a settled rule before the American Revolution, and to have been adopted here as part of the common law. Sterry v. Arden, 1 Johns. Ch. 261, 12 Johns. 536; Den v. Underwood, 4 Wash. 129; Clapp v. Leatherbee, 18 Pick. 131.

As late as 1777 Lord Mansfield said: <sup>1</sup> "There is no part of the Act of Parliament which affects voluntary settlements *eo nomine*, unless they are fraudulent." The objections to the present English rule are forcibly and ably stated by Mr. Justice Thomas in delivering the judgment of the Supreme Court of Massachusetts in *Beal v. Warren*,<sup>2</sup> already cited. "The first is, that it conclusively determines as a question of law, what is a mixed question of law and fact. A man has a right to give away his estate. Such gift is good as against him and his heirs or devisees. It is void only as against creditors, or, under that statute, as against subsequent purchasers for a valuable consideration. It is void against them, only when it was made with intent and purpose to deceive and defraud them. . . . Again: it not only makes the inference or presumption of fraud from the simple act of subsequent sale, but it makes that presumption retrospective, and conclusive of the character of a previous act, however long the interval of time between the two, or however changed the condition, relations, and motives of the actors. It says, because the grantor has now sold for a valuable consideration, the intent and purpose to sell for a valuable consideration must have existed in his mind some fifteen or twenty years ago, it may be when he made the voluntary gift. The statute draws no such conclusion. The common law, in whose light it is to be construed, draws no such conclusion. Such conclusion is not based upon any law of the human mind, or any experience of the modes of its operation. The most that can justly be said is, that the second conveyance has created a party capable of avoiding the first, if it was fraudulent; and that by reflection it has some tendency to show the purpose and intent of the first, greater or less, as the transactions are near or distant in point of time, or are connected in fact by the other evidence in the case. Another objection to this view of the statute is, that it leaves uncertain the tenure of property. The owner of real estate has the legal right to make a voluntary gift of it; and, if the gift be made in good faith, it will conclude him and his heirs, and ought to conclude all other persons. The question whether it was made in good faith depends upon the situation of his affairs when it was made, and the motives and purposes which led to the act."

<sup>1</sup> *Doe v. Routledge*, Cowp. 705. For other cases supporting this view, see cases cited in *Beal v. Warren*, 2 Gray, 447, 452, per Thomas, J.

<sup>2</sup> 2 Gray, 447, 453.

294. By the English law, moreover, a consideration of blood or marriage has always been necessary to sustain a voluntary conveyance. Where there is no such relation, a voluntary conveyance is void, not only against creditors, but also against subsequent purchasers for value, even if they have notice of the voluntary conveyance.<sup>1</sup> While this rule as to a voluntary conveyance does not prevail in this country, a voluntary conveyance upon a good consideration will be sustained against creditors, if it does not deprive them of existing rights.

A gift of land by a husband to his wife is sustained by some courts if it is only a reasonable provision for her, although he has not property remaining sufficient to pay his creditors.<sup>2</sup>

A conveyance to the use of the grantor's wife is supported by evidence that the grantor had received and used the separate property of the wife for his own purposes, in the absence of any evidence of an intention to defraud creditors.<sup>3</sup>

In equity a deed may be made directly from a husband to his wife;<sup>4</sup> and it will be sustained if the consideration is valuable or meritorious, or, under some circumstances, as a voluntary gift without any consideration by way of a reasonable settlement.<sup>5</sup>

## VII. *Parol Evidence of the True Consideration.*

295. Parol evidence is admissible to show the true consideration of a deed, provided the consideration offered to be shown is not inconsistent with that which is expressed, and does not alter the effect of the instrument.<sup>6</sup> Though the consideration

<sup>1</sup> *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494.

<sup>2</sup> *Wood v. Broadley*, 76 Mo. 23; *Hollocher v. Hollocher*, 62 Mo. 267.

<sup>3</sup> *Hill v. West*, 8 Ohio, 222, 31 Am. Dec. 442; *Hannan v. Oxley*, 23 Wis. 519.

<sup>4</sup> *Hannan v. Oxley*, 23 Wis. 519; *Pennsylvania Salt Manuf. Co. v. Neel*, 54 Pa. St. 9.

<sup>5</sup> *Hunt v. Johnson*, 44 N. Y. 27; *Townshend v. Townshend*, 1 Abb. N. C. 81.

<sup>6</sup> *Clifford v. Turrell*, 1 Y. & C. C. C. 138, per Knight-Bruce, V.-C., 9 Jur. 633, per Lord Lyndhurst. *Alabama*: *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Ohmer v. Boyer*, 89 Ala. 273, 7 So. Rep. 663; *Mobile Sav. Bank v. McDonnell*, 89 Ala.

434, 8 So. Rep. 137, 18 Am. St. Rep. 137; *Hubbard v. Allen*, 59 Ala. 283, 297; *Manning v. Pippen*, 86 Ala. 357, 5 So. Rep. 572. In this case it was held that parol evidence is admissible to show that a deed expressed to be made for a money consideration was really made in consideration of the promise of the grantee to execute a will in favor of the grantor. In this State, however, a deed impeached by creditors cannot be supported by evidence of a consideration different in kind from that expressed. *Potter v. Cracie*, 58 Ala. 303, 29 Am. Rep. 748; *Houston v. Blackman*, 66 Ala. 559, 562, 41 Am. Rep. 756. *Arkansas*: *Galbreath v. Cook*, 30 Ark. 417. *California*: *Coles v. Soulsby*, 21 Cal. 47;

expressed is money paid, it may be shown that the real consideration was goods or property valued at the sum named;<sup>1</sup> or that the actual consideration included an agreement by the grantee to pay an existing incumbrance on the property;<sup>2</sup> or that the conveyance

*Carty v. Connolly*, 91 Cal. 15, 27 Pac. Rep. 599; *Rhine v. Ellen*, 36 Cal. 362; *Hendrick v. Crowley*, 31 Cal. 471; *Peck v. Vandenberg*, 30 Cal. 11. **Connecticut**: *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Meeker v. Meeker*, 16 Conn. 383. **Florida**: *Sullivan v. Lear*, 23 Fla. 463, 2 So. Rep. 846. **Illinois**: *Huebsch v. Scheel*, 81 Ill. 281; *Morris v. Tillson*, 81 Ill. 607; *Booth v. Hynes*, 54 Ill. 363. **Indiana**: *Welz v. Rhodius*, 87 Ind. 1; *Mather v. Scoles*, 35 Ind. 1; *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638. **Iowa**: *Harper v. Perry*, 28 Iowa, 57; *Lawton v. Buckingham*, 15 Iowa, 22; *Swafford v. Whipple*, 3 Greene, 261, 54 Am. Dec. 498. **Kentucky**: *Ran-kin v. Wallace (Ky.)* 14 S. W. Rep. 79. **Maine**: *Bassett v. Bassett*, 55 Me. 127; *Tyler v. Carlton*, 17 Me. 175; *Emery v. Chase*, 5 Me. 232; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Tolman v. Ward (Me.)*, 29 Atl. Rep. 1081; *Nickerson v. Saunders*, 36 Me. 413. **Massachusetts**: *Miller v. Goodwin*, 8 Gray, 542; *Paige v. Sherman*, 6 Gray, 511; *Preble v. Baldwin*, 6 Cush. 549; *Clapp v. Tirrell*, 20 Pick. 247; *Gale v. Coburn*, 18 Pick. 397; *Bullard v. Briggs*, 7 Pick. 533; *Wilkinson v. Scott*, 17 Mass. 249, 257; *Drury v. Tremont Imp. Co.* 13 Allen, 168; *Gow-ard v. Waters*, 98 Mass. 596; *Twomey v. Crowley*, 137 Mass. 184. **Michigan**: *Stro-hauer v. Voltz*, 42 Mich. 444, 4 N. W. Rep. 161; *Blair v. Carpenter*, 75 Mich. 167. **Minnesota**: *Jordan v. White*, 20 Minn. 91; *Keith v. Briggs*, 32 Minn. 185, 20 N. W. Rep. 91. **Mississippi**: *Davidson v. Jones*, 26 Miss. 56; *Parker v. Foy*, 43 Miss. 260. **Missouri**: *Hollocher v. Hol-locher*, 62 Mo. 267; *Altringer v. Cape-heart*, 68 Mo. 441; *Miller v. McCoy*, 50 Mo. 214; *Rabsuhl v. Lack*, 35 Mo. 316; *Bobb v. Bobb*, 7 Mo. App. 501, 89 Mo. 411, 4 S. W. Rep. 511; *Wood v. Broad-ley*, 76 Mo. 23, 33; *Fontaine v. Boatman's Sav. Inst.* 57 Mo. 552. **Nebraska**: *Fall v. Glover*, 34 Neb. 522, 52 N. W. Rep. 168. **New Hampshire**: *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419. **New Jersey**: *Morris Canal & Banking Co. v. Ryerson*, 27 N. J. L. 457. **New York**: *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103, a leading case; *Frink v. Green*, 5 Barb. 455; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Murray v. Smith*, 1 Duer, 412; *Bingham v. Weiderwax*, 1 N. Y. 509; *Truscott v. King*, 6 N. Y. 147; *McKin-ster v. Babcock*, 26 N. Y. 378; *Halliday v. Hart*, 30 N. Y. 474; *Baker v. Union Mut. L. Ins. Co.* 43 N. Y. 283; *Arnot v. Erie Ry. Co.* 67 N. Y. 315. **North Caro-lina**: *Barbee v. Barbee*, 108 N. C. 581, 13 S. E. Rep. 215; *Michael v. Foil*, 100 N. C. 178. **Ohio**: *Vail v. McMillan*, 17 Ohio St. 617; *Steele v. Worthington*, 2 Ohio, 182. **Pennsylvania**: *Hartley v. M'An-ulty*, 4 Yeates, 95, 2 Am. Dec. 396. **Rhode Island**: *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. Rep. 427; *National Exchange Bank v. Watson*, 13 R. I. 91. **South Car-olina**: *Calvert v. Nickles*, 26 S. C. 304, 2 S. E. Rep. 116. **Vermont**: *Pierce v. Brew*, 43 Vt. 292. **Virginia**: *Harvey v. Alexan-der*, 1 Rand. 219, 10 Am. Dec. 519. **Wis-consin**: *Hannan v. Oxley*, 23 Wis. 519; *Horner v. Chicago, M. & St. P. Ry. Co.* 38 Wis. 165; *Kickland v. Menasha Wooden Ware Co.* 68 Wis. 34, 31 N. W. Rep. 471, 60 Am. Rep. 831.

<sup>1</sup> *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Miller v. McCoy*, 50 Mo. 214.

<sup>2</sup> *Hays v. Peck*, 107 Ind. 389, 8 N. E. Rep. 274; *McDill v. Gunn*, 43 Ind. 315; *Pitman v. Conner*, 27 Ind. 337; *Allen v. Lee*, 1 Ind. 58; *Carver v. Louthain*, 38 Ind. 530; *Robbinus v. Lister*, 30 Ind. 142; *Murray v. Smith*, 1 Duer, 412.



was made as an advancement by a father to his son, and not upon a money consideration as expressed in the deed.<sup>1</sup>

Though the consideration expressed be love and affection, it may be shown that there was a valuable consideration also, such as a transfer of property by the grantee to the grantor,<sup>2</sup> or an agreement for maintenance;<sup>3</sup> or a release of dower.<sup>4</sup>

On the other hand, where a deed expresses only a valuable consideration, it may be shown that the grantee is a blood relation to the grantor, whereupon the law will presume a consideration of natural affection in addition to the consideration expressed.<sup>5</sup>

Though the consideration expressed be the past services of the grantee, a woman, it may be shown that an additional consideration was a contemplated marriage between the parties.<sup>6</sup>

**296. A recital of a consideration paid is not inconsistent with a consideration executory in character which is the real consideration,<sup>7</sup> or with such a consideration in addition to that recited in the deed.<sup>8</sup> Though the expressed consideration of a deed to a railroad company is "benefit to be derived from the building of the road and one dollar paid," the grantor may show that the real consideration was the company's promise to build a depot on the land.<sup>9</sup> In addition to the consideration named in a deed, it may be shown that the real consideration consisted largely of the grantee's agreement to erect a sawmill on the land.<sup>10</sup>**

A deed made for the expressed consideration of one dollar, when attacked on the ground that it is a voluntary gift, may be shown to have been made for the purpose of conveying the legal

<sup>1</sup> *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607.

<sup>2</sup> *Banks v. Brown*, 2 Hill Ch. 558, 30 Am. Dec. 380; *Hannan v. Oxley*, 23 Wis. 519.

<sup>3</sup> *Gale v. Williamson*, 8 Mees. & W. 405.

<sup>4</sup> *Harvey v. Alexander*, 1 Rand, 219, 10 Am. Dec. 519.

<sup>5</sup> *Gale v. Coburn*, 18 Pick. 397; *Wallis v. Wallis*, 4 Mass. 135, 3 Am. Dec. 210; *Parker v. Nichols*, 7 Pick. 111; *Meeker v. Meeker*, 16 Conn. 383; *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607;

*Kenney v. Phillipy*, 91 Ind. 511; *Pomeroy v. Bailey*, 43 N. H. 118.

<sup>6</sup> *Miller v. Goodwin*, 8 Gray, 542.

<sup>7</sup> *Tolman v. Ward* (Me.), 29 Atl. Rep. 1081; *Sullivan v. Lear*, 23 Fla. 463, 2 So. Rep. 846; *Rankin v. Wallace* (Ky.), 14 S. W. Rep. 79.

<sup>8</sup> *Kickland v. Menasha Wooden Ware Co.* 68 Wis. 34, 31 N. W. Rep. 471.

<sup>9</sup> *Louisville, St. L. & T. Ry. Co. v. Neafus*, 93 Ky. 53, 18 S. W. Rep. 1030.

<sup>10</sup> *Fraley v. Bentley*, 1 Dak. 25, 46 N. W. Rep. 506.

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title to the real owner who had paid for the land, and had conveyed it to the grantor to hold for him.<sup>1</sup>

It may be shown that in addition to the consideration named in the deed, the grantor was to have the rents and profits of the land for the current year of the sale.<sup>2</sup>

It may be shown that the consideration paid was not paid by the grantee but by a third person, in whose favor a resulting trust thereby arose, as where land is purchased with the money of a married woman, and the deed is taken in the name of her husband.<sup>3</sup>

297. Ordinarily a deed does not profess to set out specifically the terms of the trade and the consideration which induced the making of it. An ordinary deed is regarded as an instrument of conveyance by the grantor, and not an instrument binding the grantee and setting out the undertaking on his part which constitutes the consideration upon which the grantor has executed the deed.<sup>4</sup>

Although no consideration is expressed, a valuable consideration may be proved in order to give effect to the deed.<sup>5</sup> If only a nominal consideration be expressed, a valuable consideration may be proved.<sup>6</sup>

The consideration stated in the deed is presumed to be the actual consideration, until the contrary is shown.<sup>7</sup> Though the money consideration was actually paid in property, there is a presumption that this is of the value expressed in the deed.<sup>8</sup>

298. More or less than is expressed in a deed may be proved by parol evidence as the consideration, and even a different consideration if valuable may be proved.<sup>9</sup> If the deed is assailed by the creditors of the grantor as fraudulent, the

<sup>1</sup> *Livingston v. Livingston*, 29 Neb. 167, 45 N. W. Rep. 233.

<sup>2</sup> *Bourne v. Bourne*, 92 Ky. 211.

<sup>3</sup> *Connor v. Follansbee*, 59 N. H. 124.

<sup>4</sup> *Pierce v. Brew*, 43 Vt. 292.

<sup>5</sup> *Peacock v. Monk*, 1 Ves. Sen. 128;

*Townend v. Toker*, L. R. 1 Ch. 446, per Turner, L. J.; *Ferrars v. Cherry*, 2 Vern. 383; *Llawelly Ry. Co. v. London & N. W. Ry. Co.* L. R. 8 Ch. 942; *Davenport v. Mason*, 15 Mass. 85; *White v. Weeks*, 1 Pa. 486; *Wood v. Beach*, 7 Vt. 522; *Stevens v. Griffith*, 3 Vt. 448. *New York*:

*Jackson v. Fish*, 10 Johns. 456; *Jackson v. Pike*, 9 Cow. 69; *Willson v. Betts*, 4 Denio, 201.

<sup>6</sup> *Chapman v. Emery*, 1 Cowp. 278; *Leifchild's Case*, L. R. 1 Eq. 231.

<sup>7</sup> *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Clements v. Landrum*, 26 Ga. 401; *Spear v. Ward*, 20 Cal. 659; *Gaugh v. Henderson*, 2 Head, 628; *Bayliss v. Williams*, 6 Coldw. 440.

<sup>8</sup> *Clements v. Landrum*, 26 Ga. 401.

<sup>9</sup> *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec. 292.

grantee may support it by proving any valuable consideration, though different from that expressed.<sup>1</sup> Thus the grantee may show that the actual consideration was a contemplated marriage between the grantor and grantee instead of the sum of money expressed in the deed.<sup>2</sup> The recital of a consideration is not evidence as against creditors of the grantor who were such at the time of the execution of the deed; but as against them the burden is upon the grantee to prove a consideration such as will support the deed. The effect of a consideration expressed is merely to estop the grantee from alleging that the deed was executed without consideration. For every other purpose it is open to explanation, and may be varied by parol proof.<sup>3</sup>

A deed from a mother to her married daughter, which expresses a valuable consideration in money as well as a consideration of love and affection, may be shown to have been made upon the latter consideration only, no money having been paid, where the purpose of such evidence is, not to defeat the deed, but to show that the deed was made by way of a gift, and that in consequence the land conveyed became the separate property of the daughter, and not the common property of the daughter and her husband.<sup>4</sup>

299. There are, however, decisions to the effect that an expressed consideration cannot be varied by proof of a different or further consideration, unless the instrument itself indicates that the entire contract is not disclosed, and that there was a consideration other than that expressed, the nature of which is indicated. Thus, where one conveyed land to a railroad company in consideration of one dollar and the further consideration that the company would locate its road over the grantor's land, the grantor cannot show a parol undertaking on the part of the company to establish a depot on the grantor's land, made contemporaneously with the deed and not expressed therein, because this would ingraft upon the deed conditions not expressed therein.<sup>5</sup>

<sup>1</sup> *National Exchange Bank v. Watson*, 13 R. I. 91, 43 Am. Rep. 132; *Miller v. Goodwin*, 8 Gray, 542; *Tolman v. Ward* (Me.), 29 Atl. Rep. 1081. *Contra*, *Betts v. Union Bank*, 1 Har. & G. 175, on the ground that the expressed consideration cannot be varied by parol.

<sup>2</sup> *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756.

<sup>3</sup> *Stackpole v. Robbins*, 47 Barb. 212;

*McCrea v. Purmort*, 16 Wend. 460, 30 Am. Rep. 103; *Greenvault v. Davis*, 4 Hill, 643; *Coles v. Soulsby*, 21 Cal. 47; *Hollocher v. Hollocher*, 62 Mo. 267.

<sup>4</sup> *Peck v. Vandenberg*, 30 Cal. 11. In this case the Louisiana and Texas decisions bearing upon the question are considered at length.

<sup>5</sup> *East Line, &c. R. Co. v. Garrett*, 52 Tex. 133.

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But where one conveyed land for a money consideration to a railroad company, and another instrument, executed by the grantor to the railroad company at the same time, recited that he would do certain acts in consideration of the purchase of the land by the company for the location of a depot thereon, it was held that the instruments did not evidence the entire contract, and that the grantor could show by parol that the consideration of the deed was that the company should locate a depot on the land conveyed.<sup>1</sup>

**300.** If there is a consideration in addition to a valuable consideration expressed, it is not necessary to prove such other consideration. A deed which expresses a valuable consideration, though this be merely a nominal one, need not, as against the grantor and those claiming under him, or as against a stranger, be supported by showing what other reason, in addition to the will of the grantor, led to its execution. Thus where a deed made in consideration of one dollar also recited it was executed under and by virtue of the statute concerning voluntary assignments made pursuant to the application of an insolvent and his creditors, and in pursuance of an order made by a county judge, it was held that the deed might be given in evidence without proving the insolvency of the grantor.<sup>2</sup> And so, if a deed purporting to be made in pursuance of a decree of court also recites a valuable consideration, the latter consideration is sufficient to support the deed without proving the existence of the decree.<sup>3</sup>

**301.** The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor. For every other purpose the consideration may be varied or explained by parol proof.<sup>4</sup> As between the parties, "one dollar viewed as a consideration is as much a valuable consideration as a million dollars."<sup>5</sup>

A valuable consideration is essential at common law to raise a

<sup>1</sup> *Gulf, &c. Ry. Co. v. Jones*, 82 Tex. 156, 17 S. W. Rep. 534.

<sup>2</sup> *Rockwell v. Brown*, 54 N. Y. 210.

<sup>3</sup> *Tonera v. Henderson*, 3 Litt. 235.

<sup>4</sup> *Goodspeed v. Fuller*, 46 Me. 141, per Appleton, J.; *Tolman v. Ward* (Me.), 29 Atl. Rep. 1081, per Walton, J.; *McCrea v.*

*Purmort*, 16 Wend. 460; *Gordon v. Gordon*, 1 Met. (Ky.) 285; *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Meeker v. Meeker*, 16 Conn. 383; *Morrall v. Waterson*, 7 Kans. 199.

<sup>5</sup> *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519, per Cabell, J.

use. If there is no consideration expressed, and none in fact, and no use is declared, a trust results in favor of the grantor and the operation of the deed is defeated. "If, then, the grantor of a deed of bargain and sale, which expressed a money consideration, should be permitted to prove by parol testimony that no money was in fact paid, he would be permitted to show, in opposition to the deed itself, that he had made no conveyance of a beneficial interest at all, and thereby prevent any beneficial estate from passing from him by the deed. This the policy of the law would not permit him to do, and he was held estopped by his deed from showing the fact for the purpose of preventing his deed from operating to pass an estate."<sup>1</sup>

302. The consideration stated in the deed cannot be disproved for the purpose of defeating the conveyance, but for all other purposes it is subject to be modified or varied by parol proof.<sup>2</sup>

For the purpose of destroying the effective operation of a deed, the grantor's administrator is estopped, just as the grantor himself would be, from denying that there was a consideration for such deed.<sup>3</sup>

The grantor is not allowed to impeach his conveyance by showing that the consideration was an illegal one, as that it was made in pursuance of a lottery scheme in which he participated. He is not allowed to defeat his deed by showing his own unlawful act.<sup>4</sup>

<sup>1</sup> *Peck v. Vandenberg*, 30 Cal. 11, 25, per Sawyer, J.

<sup>2</sup> *McCalla v. Bane*, 45 Fed. Rep. 828. **Alabama**: *Vincent v. Walker*, 93 Ala. 165, 9 So. Rep. 382; *Ohmer v. Boyer*, 89 Ala. 273, 7 So. Rep. 663. **California**: *Irvine v. McKeon*, 23 Cal. 472. **Connecticut**: *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661. **Illinois**: *Kimball v. Walker*, 30 Ill. 482; *Richardson v. Clow*, 8 Bradw. 91. **Indiana**: *Bever v. North*, 107 Ind. 544, 8 N. E. Rep. 576. **Maine**: *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219; *Abbott v. Marshall*, 48 Me. 44. **Massachusetts**: *Wilkinson v. Scott*, 17 Mass. 249, 257. **Missouri**: *Bobb v. Bobb*, 89 Mo. 411, 4 S. W. Rep. 511;

*Henderson v. Henderson*, 13 Mo. 151. **New Hampshire**: *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Connor v. Follansbee*, 59 N. H. 124; *Horn v. Thompson*, 31 N. H. 562; *Farrington v. Barr*, 36 N. H. 86; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236. **Ohio**: *Vail v. McMillan*, 17 Ohio St. 617. **Rhode Island**: *National Exchange Bank v. Watson*, 13 R. I. 91, 43 Am. Rep. 132. **Wisconsin**: *Hannan v. Oxley*, 23 Wis. 519.

<sup>3</sup> *Campbell v. Carruth (Fla.)*, 13 So. Rep. 432.

<sup>4</sup> *Allebach v. Hunsicker*, 132 Pa. St. 349, 19 Atl. Rep. 139; *Winton v. Freeman*, 102 Pa. St. 366.

VIII. *Recital of Payment of the Consideration.*

303. The acknowledgment of consideration contained in a deed is only presumptive evidence of payment, and does not estop the grantor from maintaining an action against the grantee for the consideration remaining unpaid. It is *prima facie* evidence of a valuable consideration paid and of the amount paid.<sup>1</sup>

- <sup>1</sup> *Mills v. Dow*, 133 U. S. 423, 431, 10 Sup. Ct. Rep. 413, per Blatchford, J.; *Taggart v. Stanberry*, 2 McLean, 543. **Alabama**: *Hubbard v. Allen*, 59 Ala. 283. **California**: *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. Rep. 889; *Irvine v. McKeon*, 23 Cal. 472; *Rhine v. Ellen*, 36 Cal. 362. **Connecticut**: *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Sparrow v. Smith*, 5 Conn. 113; *Meeker v. Meeker*, 16 Conn. 383; *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398. **Delaware**: *Callaway v. Hearn*, 1 Houst. 607. **Georgia**: *Bonner v. Metcalf*, 58 Ga. 236. **Illinois**: *Richardson v. Clow*, 8 Bradw. 91; *Ayers v. McConnell*, 15 Ill. 230; *Kimball v. Walker*, 30 Ill. 482; *Morris v. Tillson*, 81 Ill. 607. **Indiana**: *McConnell v. Citizens' State Bank*, 130 Ind. 127, 27 N. E. Rep. 616. **Kentucky**: *Gully v. Grubbs*, 1 J. J. Marsh. 387, 389; *Hutchison v. Sinclair*, 7 Mon. 291; *Bryant v. Hunter*, 6 Bush, 75; *Engleman v. Craig*, 2 Bush, 424; *Gordon v. Gordon*, 1 Met. 285. **Maine**: *Barter v. Greenleaf*, 65 Me. 405; *Bassett v. Bassett*, 55 Me. 127; *Long v. Woodman*, 65 Me. 56, overruling *Steele v. Adams*, 1 Me. 1; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Dearborn v. Parks*, 5 Me. 81, 17 Am. Dec. 206; *Schilling v. McCann*, 6 Me. 364; *Burbank v. Gould*, 15 Me. 118; *Nickerson v. Saunders*, 36 Me. 413. **Maryland**: *Wolfe v. Hauver*, 1 Gill, 84, overruling earlier cases in that State; *Morgan v. Bitzenberger*, 3 Gill, 350. **Massachusetts**: *Paige v. Sherman*, 6 Gray, 511; *Miller v. Goodwin*, 8 Gray, 542; *Drury v. Tremont Improvement Co.* 13 Allen, 168; *Wilkinson v. Scott*, 17 Mass. 249; *Clapp v. Tirrell*, 20 Pick. 247; *Carr v. Dole*, 119 Mass. 294. **Minnesota**: *Kumler v. Ferguson*, 7 Minn. 442. **Mississippi**: *Parker v. Foy*, 43 Miss. 260, 55 Am. Rep. 484. **Missouri**: *Hogel v. Lindell*, 10 Mo. 483; *Henderson v. Henderson*, 13 Mo. 151; *Hollocher v. Hollocher*, 62 Mo. 267; *Fontaine v. Boatman's Sav. Inst.* 57 Mo. 552. **Nebraska**: *Patrick v. Leach*, 2 Fed. Rep. 120. **New Hampshire**: *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Kimball v. Fenner*, 12 N. H. 248; *Nutting v. Herbert*, 37 N. H. 346. **New York**: *Shepard v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 Johns. 338, 11 Am. Dec. 286; *M'Crea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Grout v. Townsend*, 2 Hill, 554, 2 Denio, 336; *Barnum v. Childs*, 1 Sandf. 58; *Sanford v. Sanford*, 61 Barb. 293; *Witbeck v. Wayne*, 16 N. Y. 532; *Diefendorf v. Diefendorf*, 8 N. Y. Supp. 617; *Murdock v. Gilchrist*, 52 N. Y. 242; *Reubens v. Joel*, 13 N. Y. 488. **North Carolina**: *Barbee v. Barbee*, 108 N. C. 581, 13 S. E. Rep. 215; *Shaw v. Williams*, 100 N. C. 272; *Medley v. Mask*, 4 Ired. Eq. 339. *Contra*, *Brocket v. oscue*, 1 Hawks, 64; *Mendenhall v. Parish*, 8 Jones L. 105, 78 Am. Dec. 269. **Pennsylvania**: *Hamilton v. McGuire*, 3 S. & R. 355; *Weigley v. Weir*, 7 S. & R. 309; *Byers v. Mullen*, 9 Watts, 266; *Watson v. Blaine*, 12 S. & R. 131, 14 Am. Dec. 669; *Dutton v. Tilden*, 13 Pa. St. 46; *Cox v. Henry*, 32 Pa. St. 18; *Batdorf v. Albert*, 59 Pa. St. 61. **Tennessee**: *Bayliss v. Williams*, 6 Coldw. 440. **Vermont**: *Beach v. Packard*, 10 Vt. 96, 33 Am. Dec. 185; *Lazell v. Lazell*, 12 Vt. 443, 36 Am. Dec. 352. **Virginia**: *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519; *Du-*

The statement of the consideration in a deed is in large part for the purpose of giving full effect to the instrument, and not to disclose in full the contract between the parties.<sup>1</sup> A recital of the payment of a particular consideration does not exclude proof of other and consistent consideration.<sup>2</sup>

This rule does not apply when the recitals as to the consideration are ambiguous, as where the amount was stated quite differently in different places in the deed.<sup>3</sup>

**304.** A sale of land is a good consideration for an oral promise to pay the price of it, and such price may be recovered after the conveyance by an action of assumpsit.<sup>4</sup> If, however, the promise is not to pay money, but to convey real estate in exchange, such promise is void by the statute of frauds.<sup>5</sup> If one party to such agreement refuses to fulfil his agreement to convey after he has received the deed of the other party, the latter may recover upon the implied promise of the former to pay the price for the land when this has been estimated by the parties at a fixed sum; but the cause of action is not properly described by a count for money had and received, but by a count for the price or value of the land sold and conveyed. The action is not for money agreed to be paid, but for the price or value of the land.<sup>6</sup>

In the absence of fraud, when the grantor is content with a quitclaim deed, the rule *caveat emptor* applies, and he must pay the consideration for the deed whether he receives any title or not.<sup>7</sup>

**305.** It may be shown that the grantee, at the time of the sale, agreed to pay a sum additional to that expressed in the deed, and the agreement may be enforced although it was parol

val v. Bibb, 4 Hen. & M. 113, 4 Am. Dec. 506; Wilson v. Shelton, 9 Leigh, 342. Wisconsin: Kickland v. Menasha Wooden Ware Co. 68 Wis. 34, 31 N. W. Rep. 471, 831, 60 Am. Rep. 831.

<sup>1</sup> Collins v. Tillou, 26 Conn. 368, 68 Am. Dec. 398; Clarke v. Tappin, 32 Conn. 56, 69.

<sup>2</sup> Engleman v. Craig, 2 Bush, 424; Gordon v. Gordon, 1 Met. (Ky.) 285.

<sup>3</sup> Hall v. Loveman (Ala.), 3 So. Rep. 767.

<sup>4</sup> Nelson v. Swan, 13 Johns. 483; Bowen

v. Bell, 20 Johns. 338, 11 Am. Dec. 286; Whitbeck v. Whitbeck, 9 Cow. 266, 18 Am. Dec. 503; Basford v. Pearson, 9 Allen, 387, 85 Am. Dec. 764.

<sup>5</sup> Griswold v. Messenger, 6 Pick. 516.

<sup>6</sup> Basford v. Pearson, 9 Allen, 387, 85 Am. Dec. 764.

<sup>7</sup> Hulett v. Hamilton (Minn.), 61 N. W. Rep. 672; Washington L. Ins. Co. v. Marshall (Minn.), 57 N. W. Rep. 658; Mitchell v. Chisholm (Minn.), 58 N. W. Rep. 873.

RECITAL OF PAYMENT OF THE CONSIDERATION. [ §§ 306, 307.

merely.<sup>1</sup> It may be shown by such evidence that the grantee agreed to assume and pay a mortgage upon the land as a part of the consideration for the conveyance stated in the deed.<sup>2</sup>

If in an exchange of lands it be agreed that the taxes upon the lands shall be offset and shall be paid by the grantors, such payment of the taxes becomes a part of the consideration of the conveyance. Parol proof of such agreement is admissible, and a suit may be maintained for money paid by one of the grantees for the amount paid by him in removing the incumbrance of the taxes.<sup>3</sup>

**306.** The actual payment of the nominal consideration expressed in a deed is not essential to its validity. It is sufficient if it is expressed to have been paid. The admission of its payment is generally only a formality. This admission is not essential to the conveyance. It is immaterial whether it was actually paid or not, even if the acknowledgment of the payment be inserted for the purpose of attesting the fact. Such acknowledgment is no better evidence than a sealed receipt on a separate paper would be.<sup>4</sup>

**307.** As between the parties, the acknowledgment of payment, like any other receipt, changes the burden of proof, and requires the grantor, not only to prove the sale of the land, but to prove that it remains unpaid for.<sup>5</sup> Such acknowledgment is

<sup>1</sup> *Nickerson v. Saunders*, 36 Me. 413; *Tyler v. Carlton*, 7 Me. 175.

<sup>2</sup> *Jones on Mortgages*, § 750; *Burnham v. Dorr*, 72 Me. 198; *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. Rep. 677; *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. Rep. 642; *Lamb v. Tucker*, 42 Iowa, 118; *Bolles v. Beach*, 22 N. J. L. 680, 53 Am. Dec. 263; *Wilson v. King*, 23 N. J. Eq. 150; *Wright v. Briggs*, 99 Ind. 563; *Buckley's App.* 48 Pa. St. 491, 88 Am. Dec. 468; *Merriman v. Moore*, 90 Pa. St. 78; *Putney v. Farnham*, 27 Wis. 187; *Society of Friends v. Haines*, 47 Ohio St. 423, 25 N. E. Rep. 119; *Groce v. Jenkins*, 28 S. C. 172, 5 S. E. Rep. 352. *Contra*, *Lewis v. Day*, 53 Iowa, 577, 5 N. W. Rep. 753.

<sup>3</sup> *Robinius v. Lister*, 30 Ind. 142, 95 Am. Dec. 674; *Brackett v. Evans*, 1 Cush. 79, 82; *Preble v. Baldwin*, 6 Cush. 549; *Carr v. Dooley*, 119 Mass. 294.

<sup>4</sup> *Meriam v. Harsen*, 2 Barb. Ch. 232; *Winans v. Peebles*, 31 Barb. 371; *McCrea v. Purmort*, 16 Wend. 460, 474, 30 Am. Dec. 103. "A release cannot be contradicted or explained by parol, because it extinguishes a preëxisting right; but no receipt can have the effect of destroying, *per se*, any subsisting right; it is only evidence of a fact. The payment of the money discharges or extinguishes the debt. A receipt for the payment does not pay the debt: it is only evidence that it has been paid. Not so of a written release: it is not only evidence of the extinguishment, but is the extinguishment itself." *Per* Cowan, J.

<sup>5</sup> *Mills v. Dow*, 133 U. S. 423, 431, 10 Snp. Ct. Rep. 413, *per* Blatchford, J.; *Lawrence v. McCalmont*, 2 How. 426; *Beach v. Packard*, 10 Vt. 96, 33 Am. Dec. 185; *Jackson v. McChesney*, 7 Cow. 360,



also *prima facie* evidence as against persons who have subsequently derived title from the grantor. But as against a stranger the acknowledgment of payment is no evidence whatever; it is only an *ex parte* declaration, not under oath.<sup>1</sup> Where a deed is impeached on the ground that it was made to defraud creditors, the acknowledgment of the consideration is the lowest species of *prima facie* evidence, inasmuch as the same motives which would induce the parties to execute a fraudulent conveyance would induce them to insert, in the strongest terms, an acknowledgment of the receipt of the consideration.<sup>2</sup>

The recital of payment of the consideration in a deed is not evidence as against third persons.<sup>3</sup>

**308.** The presumption is that the person to whom a deed is made paid his own money for it. Where a deed is made to a married woman which expresses on its face that the consideration was paid by her, there is a presumption that the consideration was her own money.<sup>4</sup> But where the consideration is called in question, and evidence is given from which the jury may draw the conclusion that the consideration money paid was not that of the grantee, but of some other person, whose land it is alleged by the party disputing the fact of payment by the grantee to be, the duty is cast upon such grantee, or person asserting the payment by the grantee, to prove the fact to the satisfaction of the jury; otherwise the presumption is to be taken to be overthrown.<sup>5</sup>

**309.** But evidence that the consideration recited was not in fact paid cannot be used to avoid the deed, or to affect its legal import as between the parties. The grantor is estopped, by a recital of a consideration paid, to claim a resulting trust in his favor, or to deny that the deed was executed for the uses expressed in it.<sup>6</sup>

17 Am. Dec. 521; *Bolling v. Munchus*, 65 Ala. 558; *Grimball v. Maslin*, 77 Ala. 553.

<sup>1</sup> *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Hubbard v. Allen*, 59 Ala. 283; *Galland v. Jackman*, 26 Cal. 79, 85 Am. Dec. 172.

<sup>2</sup> *Clapp v. Tirrell*, 20 Pick. 247, per Shaw, C. J.

<sup>3</sup> *Bolton v. Johns*, 5 Pa. St. 145, 47 Am. Dec. 404; *Search's Appeal*, 13 Pa. St. 108; *Lloyd v. Lynch*, 28 Pa. St. 419;

*Redfield, &c. Co. v. Dysart*, 62 Pa. St. 62; *Pennsylvania Salt Manuf. Co. v. Neel*, 54 Pa. St. 9.

<sup>4</sup> *Stall v. Fulton*, 30 N. J. L. 430; *Jones v. Cannon*, 8 Houst. 1, 31 Atl. Rep. 521.

<sup>5</sup> *Jones v. Cannon*, *supra*.

<sup>6</sup> *Wilkinson v. Scott*, 17 Mass. 249; *Bassett v. Bassett*, 55 Me. 127; *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Sparrow v. Smith*, 5 Conn. 113; *Kimball v. Walker*, 30 Ill. 482; *Pennsylvania Salt Manuf. Co. v. Neel*, 54 Pa. St. 9; *Graves v.*

This rule was held not to apply as against a married woman seeking relief from a conveyance of her statutory estate. Her recital of a consideration did not estop her, under the former statutes of Alabama, from showing that no consideration was in fact paid. Only such a deed as the statute authorized her to execute could raise an estoppel against her.<sup>1</sup> The statute only authorized her to sell her separate estate, and not to give it away.

310. As against creditors of the grantor, his deed is regarded as voluntary until the payment of a valuable consideration is shown. Where there is proof, however slight, of fraud in a sale, the burden of proving payment of the consideration is on the grantee. The acknowledgment of the receipt of the consideration, which is in the first instance *prima facie* evidence of its payment, is rebutted by the evidence of fraud, and the burden of proof is no longer upon the party attacking the deed, but upon the party claiming under it.<sup>2</sup> The *prima facie* evidence of the payment of a consideration arising from the admission of it in the deed is sufficiently rebutted by showing that the party claiming the invalidity of the conveyance was a creditor of the grantor when the deed was made. The acknowledgment of a consideration received is not evidence of that fact against an existing creditor, and a deed is presumed to be fraudulent against such creditors until proof of an actual consideration paid is given.<sup>3</sup> The proof of the execution of the deed, when this acknowledges

Graves, 29 N. H. 129; Moore v. Shattuck, 4 N. H. 229; Farrington v. Barr, 36 N. H. 86; Henderson v. Henderson, 13 Mo. 151; Hollocher v. Hollocher, 62 Mo. 267; McConnell v. Brayner, 63 Mo. 461; Bobb v. Bobb, 7 Mo. App. 501, 89 Mo. 411, 4 S. W. Rep. 511; Vincent v. Walker, 93 Ala. 165, 9 So. Rep. 382; Mobile Sav. Bank v. McDonnell, 89 Ala. 434, 8 So. Rep. 137; Beach v. Packard, 10 Vt. 96, 33 Am. Dec. 185; Grout v. Townsend, 2 Hill, 554, 2 Denio, 336; Meriam v. Hassen, 2 Barb. Ch. 232; Bank of U. S. v. Housman, 6 Paige, 526.

<sup>1</sup> Code 1876, §§ 2707, 2709; Vincent v. Walker, 93 Ala. 165, 9 So. Rep. 382; Shulman v. Fitzpatrick, 62 Ala. 571.

<sup>2</sup> Redfield & Rice Manuf. Co. v. Dysart, 62 Pa. St. 62; Kerr v. Birnie, 25 Ark. 225; Milburn v. Phillips (Ind.), 34 N. E.

Rep. 983; Jackson v. McChesney, 7 Cow. 360, 17 Am. Dec. 521.

<sup>3</sup> Prescott v. Hayes, 43 N. H. 593; Kimball v. Fenner, 12 N. H. 248; Belknap v. Wendell, 21 N. H. 175; Ferguson v. Clifford, 37 N. H. 86; Mobile Sav. Bank v. McDonnell, 89 Ala. 434; Roswald v. Hobbie, 85 Ala. 73, 4 So. Rep. 177; Milburn v. Phillips (Ind.), 34 N. E. Rep. 983; Wells v. Watson (Ala.), 14 So. Rep. 361; Hubbard v. Allen, 59 Ala. 283; Tutwiler v. Munford, 68 Ala. 124; Ellis v. Allen, 80 Ala. 515, 2 So. Rep. 676; Lipscomb v. McClellan, 72 Ala. 151; Calhoun v. Hannan, 87 Ala. 277, 6 So. Rep. 291; Thorington v. City Council, 88 Ala. 548, 7 So. Rep. 363; Dollins v. Pollock, 89 Ala. 351, 7 So. Rep. 904; Allen v. Cowan, 23 Barb. 99; Peck v. Mallams, 10 N. Y. 509, 528.

payment of the consideration, carries with it proof that the consideration was paid, so far as the grantor is concerned; but his admission of payment, when used against his creditors, is no evidence against them. As against them, a deed is regarded as merely voluntary until evidence is offered that it was founded on a valuable consideration, and that this was actually paid. These decisions tend to the suppression of fraud.<sup>1</sup>

<sup>1</sup> *Kimball v. Fenner*, 12 N. H. 248, per Parker, C. J.  
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## CHAPTER XVII.

### OPERATIVE WORDS.

311. The operative words of a deed are the words by which the estate passes from the grantor to the grantee. "Originally the operative words which were used all had their distinctive meanings and appropriate uses. These words are: 'enfeoff,' proper to be used in a feoffment; 'grant,' applicable to the conveyance of freehold hereditaments of every kind not lying in livery; 'release,' appropriate to the conveyance to the person in possession of the remainder expectant on his estate; 'alien and assure,' the most general words of conveyance; 'bargain and sale,' which operated either under the Statute of Uses, to vest the legal estate in the bargainee, or at the common law, in exercise of a common-law power of sale; and 'confirm,' which, though properly suitable only to cases of actual confirmation of a previous conveyance, was generally used without distinct reference to its proper meaning. . . . Where a deed operates in exercise of a power, the proper operative word is 'appoint.'"<sup>1</sup>

While words of conveyance should be placed in the appropriate part of the deed, it is sufficient if they are found in any part of it, and are so used as to express an intention to convey.<sup>2</sup>

312. Any words which denote an intention to transfer the title to land are sufficient to make an effectual deed.<sup>3</sup> The words "make over and grant" are effectual to convey land by way of a use in a deed of bargain and sale.<sup>4</sup> But where the only words used were "sign over," it was held that they could not be considered operative words showing an intention to convey

<sup>1</sup> 5 Bythewood's Prec. 162, 163.

<sup>2</sup> *Bridge v. Wellington*, 1 Mass. 219; *Kenworthy v. Tullis*, 3 Ind. 96; *Hummelman v. Mounts*, 87 Ind. 178, per Elliott, J.; *Branson v. Studebaker* (Ind.), 33 N. E. Rep. 98, 105, per Elliott, J.

<sup>3</sup> *Gambril v. Rose*, 8 Blackf. 140, 44

Am. Dec. 760. The words were "mortgage, assign over, and transfer." *Cobb v. Hines*, Busbee, 343, 59 Am. Dec. 559.

<sup>4</sup> *Jackson v. Alexander*, 3 Johns. 484.

an estate in land.<sup>1</sup> The word "convey" passes the title as effectually as a grant at common law.<sup>2</sup>

The word "grant" is of very general use as a word of conveyance. It has lost its restricted meaning at common law, and is at the present day effectual to convey an estate in a corporeal hereditament.<sup>3</sup>

Where the words "give and grant," and the words "bargain and sell," as well, are used, the operative words of both these forms of conveyance are united, and the deed is a deed of feoffment as well as a deed of bargain and sale,<sup>4</sup> and requires no pecuniary consideration to support it.

Words of conveyance in the past tense only are sufficient, as, for instance, "have given, granted, and confirmed."<sup>5</sup>

313. The courts will construe the words used by the parties so as to give effect to the deed, if possible. "The judges have been *astuti* to carry the intent of the parties into execution, and to give the most liberal and benign construction to deeds, *ut res magis valeat*."<sup>6</sup> Upon this principle a feoffment, or a bargain and sale from a parent to a child, to take effect after the death of the parent, may be held to be a covenant to stand seised to the use of the parent for life, because a deed of bargain and sale would be void.<sup>7</sup>

A release to one not in possession, if made for a valuable consideration, will be construed to be a bargain and sale, or a covenant to stand seised, by which the estate might pass.<sup>8</sup> And so a deed of lease and release has been held to be a covenant to stand seised to uses where the consideration was a good one.<sup>9</sup> A deed which cannot take effect as a bargain and sale, for want of a

<sup>1</sup> McKinney v. Settles, 31 Mo. 541.

<sup>2</sup> Patterson v. Carneal, 3 A. K. Marsh. 618, 13 Am. Dec. 208.

<sup>3</sup> San Francisco & O. R. Co. v. Oakland, 43 Cal. 502.

<sup>4</sup> Poe v. Domec, 48 Mo. 441; Perry v. Price, 1 Mo. 553; Belden v. Seymour, 8 Conn. 304, 318, 21 Am. Dec. 661, per Homer, C. J.; Cheney v. Watkins, 1 Harr. & J. 527; Springs v. Hanks, 5 Ired. 30.

<sup>5</sup> Pierson v. Armstrong, 1 Iowa, 282.

<sup>6</sup> Roe v. Tranmer, 2 Wils. 75, per Willes, C. J. See, also, Shove v. Pincke, 5 T. R. 124; Haggerston v. Hanbury, 5 Barn. &

C. 101, 106; Russell v. Coffin, 8 Pick. 143; Bryan v. Bradley, 16 Conn. 474; Emery v. Chase, 5 Maine, 232; Jackson v. Beach, 1 Johns. Cas. 399, 402.

<sup>7</sup> Wallis v. Wallis, 4 Mass. 135; Brewer v. Hardy, 22 Pick. 376. And see Barrett v. French, 1 Conn. 354; Rowletts v. Daniel, 4 Munf. 473.

<sup>8</sup> Pray v. Pierce, 7 Mass. 381; Lynch v. Livingston, 8 Barb. 463. Such prior possession is not now necessary under the common form of conveyance by quitclaim and release. Russell v. Coffin, 8 Pick. 143.

<sup>9</sup> Doe v. Tranmer, 2 Wils. 75.

pecuniary consideration, may be given effect as a covenant to stand seised if there is a consideration of blood.<sup>1</sup> In Massachusetts, where a valuable consideration is sufficient to support a covenant to stand seised, a deed of bargain and sale may operate as a covenant to stand seised when it is necessary that it should have that effect in order to carry out the manifest intention of the parties.<sup>2</sup>

**314. A deed without words of conveyance passes no title.**<sup>3</sup> In some States it is provided by statute that any instrument in writing signed by the grantor is effectual to transfer the legal title, if such was the intention of the grantor, to be collected from the entire instrument. But, even under such statutes, some words of conveyance are necessary.<sup>4</sup> The statute does not wholly dispense with the use of words operative to convey, but simply imposes upon the courts the duty of construing liberally the words employed as words of transfer.<sup>5</sup>

An assignment of a deed, indorsed thereon, does not convey any interest in the lands therein described. In equity it might entitle the assignee to a decree for a specific performance, but it cannot operate as a transfer of the legal title.<sup>6</sup>

**315. If an instrument has no words of conveyance, the courts have no right to put them in by interpretation.** "Courts cannot make contracts for parties. It is not their province to write in an instrument words which will make it operative as a deed, where none of that character have been written by the parties themselves. The rule that courts will so construe an in-

<sup>1</sup> *Eckman v. Eckman*, 68 Pa. St. 460.

<sup>2</sup> *Trafton v. Hawes*, 102 Mass. 533, 541, 3 Am. Rep. 494; *Hall v. Bliss*, 118 Mass. 554, 560, 19 Am. Rep. 476, per Gray, C. J.; *Pray v. Pierce*, 7 Mass. 381, 384, 5 Am. Dec. 59; *Russell v. Coffin*, 8 Pick. 143, 151.

<sup>3</sup> *Davis v. Davis*, 43 Ind. 561, where the deed, after naming the grantors, was "for the sum of six thousand dollars, the following real estate," describing it. *Hummelman v. Mounts*, 87 Ind. 178, where the writing was "I, J. S., warrant and defend unto C. S., her heirs and assigns forever, the receipt whereof is hereby acknowledged, the following real estate," described.

<sup>4</sup> *Bell v. McDuffie*, 71 Ga. 264.

<sup>5</sup> *Webb v. Mullins*, 78 Ala. 111; *Brewton v. Watson*, 67 Ala. 121. The instrument in this case was styled articles of agreement, and the only words referring to the passing of the title were, "and the said Watson, upon the faithful performance on her part of this contract, shall have and be entitled to, at and after the death of said Browning, all the property, both real and personal, now owned by the said Browning." It was held that these were words of covenant or contract, and not of conveyance.

<sup>6</sup> *Bentley v. Deforest*, 2 Ohio, 221, 15 Am. Dec. 546. There are decisions to the contrary. See § 589.

strument as to make it effective does not mean that courts shall inject into it new and distinct provisions.”<sup>1</sup>

**316. A deed does not bind a person signing it unless it contains words expressive of an intention to convey some estate, title, or interest.**<sup>2</sup> “It has been said that the signing of a deed manifests the intention of the signer to be bound by it, and that the courts should construe every instrument so as to give effect to the intention of the parties to it. But the intention of the parties to a written contract must be derived from the language of the contract itself; and, where there is nothing in the deed to show an undertaking on the part of one of the signers to convey, we do not see very clearly that his signature manifests a purpose to make a conveyance. Where the title is in one person, and the consent of another is essential, under the law, to convey such title, and such other signs the deed, his name not appearing thereon as a grantor, the signature, it would seem, would merely manifest his consent to the conveyance.”<sup>3</sup>

Merely signing, sealing, and acknowledging an instrument in which another person is grantor is not sufficient.<sup>4</sup>

**317. If from the whole deed the grantor appears to be named as such, and his intention to convey is manifest, the deed is not void, though his name does not appear in its proper place in the granting clause.** Thus, where a conveyance is in the form of an indenture between the person who signs it as grantor,

<sup>1</sup> *Hummelman v. Mounts*, 87 Ind. 178, per Elliott, J.

<sup>2</sup> *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Peabody v. Hewett*, 52 Me. 33; *McKinney v. Setles*, 31 Mo. 541.

<sup>3</sup> *Stone v. Sledge (Tex.)*, 26 S. W. Rep. 1068, per Gaines, J.

<sup>4</sup> *Batchelor v. Brereton*, 112 U. S. 396; *Agricultural Bank v. Rice*, 4 How. 225, per Taney, C. J.; *Lane v. Dolick*, 6 McLean, 200, 203; *Powell v. Monson, &c. Manuf. Co.* 3 Mason, 347; *Hall v. Savage*, 4 Mason, 273; *Cox v. Wells*, 7 Blackf. 410; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Lufkin v. Curtis*, 13 Mass. 223; *Hubbard v. Knous*, 3 Gray, 567; *Bruce v. Wood*, 1 Met. 542; *Leavitt v. Lamprey*, 13 Pick. 382, 23 Am. Dec. 685; *Greenough v. Turner*, 11 Gray, 332;

*Wildes v. Vanvoorhis*, 15 Gray, 139; *Peabody v. Hewett*, 52 Me. 33; *Payne v. Parker*, 10 Me. 178, 25 Am. Dec. 221; *Lothrop v. Foster*, 51 Me. 367; *Stevens v. Owen*, 25 Me. 94; *Harrison v. Simons*, 55 Ala. 510; *Adams v. Medsker*, 25 W. Va. 127; *Hutchings v. Talbot*, 3 Har. & J. 378; *Purcell v. Goshorn*, 17 Ohio, 105. **Texas:** *Stone v. Sledge (Tex.)*, 26 S. W. Rep. 1068, affirming (Tex.) 24 S. W. Rep. 697.

Contrary to the general rule, see *Ingoldsby v. Juan*, 12 Cal. 564; *Dentzel v. Waldie*, 30 Cal. 138; *Stone v. Montgomery*, 35 Miss. 83; *Armstrong v. Stovall*, 26 Miss. 275; *Woodward v. Seaver*, 38 N. H. 29; *Burge v. Smith*, 27 N. H. 332; *Elliott v. Sleeper*, 2 N. H. 525.

of one part, and a person named as grantee, of the other part, the omission of the grantor's name in the granting clause, when it appears in the covenant of warranty as well as in the *in testimentum* clause, is not a fatal defect.<sup>1</sup>

The receipt of the consideration by a person who signed a deed but did not join in it as a grantor does not operate to give effect to the deed as his conveyance.<sup>2</sup>

318. A deed by a husband in his own name only, conveying his wife's land in fee, in which she does not join, though she affixes her signature and seal, is not a conveyance of her estate in fee.<sup>3</sup> Her signature, "in token of her relinquishment of all her right in the bargained premises," or "in token of her release of dower," does not convey her title in fee, nor bar her from asserting her title.<sup>4</sup> That it was her intention to convey her estate in fee is not sufficient unless this intention is expressed in the deed. Such intention will not enable a court of chancery to correct the mistake and decree the execution of a perfect deed.<sup>5</sup>

The signing of the deed by the wife at most merely signifies her consent to the conveyance; it does not convey any interest or estate she has in the granted land. Under statutes which provide that a conveyance by a married woman may be made with the written consent of her husband, it is held that this consent is sufficiently manifested by his signing a deed by which his wife conveys her separate property, though he is not named as a party to the deed.<sup>6</sup> The husband has nothing to convey, and his assent to the conveyance by his wife is all that is required. The case is very different when the legal interest or estate is in the wife, and she does not join in the deed, or use any words manifesting an intention to convey such interest or estate, but merely signs a deed which purports to be a conveyance by the husband alone.<sup>7</sup>

<sup>1</sup> *Mardes v. Meyers* (Tex. Civ. App.), 28 S. W. Rep. 693. The court distinguishes the case from *Stone v. Sledge* (Tex. Sup.), 26 S. W. Rep. 1068, where it nowhere appeared from the deed that Mrs. Stone was to join her husband in its execution.

<sup>2</sup> *Agricultural Bank v. Rice*, 4 How. 225.

<sup>3</sup> *Agricultural Bank v. Rice*, 4 How. 225; *Bruce v. Wood*, 1 Met. 542, 35 Am. Dec. 380; *Payne v. Parker*, 10 Me. 178,

25 Am. Dec. 221; *Purcell v. Goshorn*, 17 Ohio, 105.

<sup>4</sup> *Wales v. Coffin*, 13 Allen, 213.

<sup>5</sup> *Purcell v. Goshorn*, 17 Ohio, 105. In New Hampshire, by custom, the wife is bound by signing, without more. *Woodward v. Seaver*, 38 N. H. 29; *Elliot v. Sleeper*, 2 N. H. 525.

<sup>6</sup> § 38, and *Ochoa v. Miller*, 59 Tex. 460.

<sup>7</sup> *Stone v. Sledge* (Tex.), 26 S. W. Rep. 1068.



**319. A wife cannot bar her right of dower by signing and sealing her husband's deed without any words of conveyance or of release by her of dower.<sup>1</sup>**

By usage, however, in New Hampshire a wife may bar her dower by signing her husband's deed without any words of conveyance or release.<sup>2</sup>

The words, "in token of her free consent," used at the conclusion of a deed, do not sufficiently express her intention to bar her right of dower,<sup>3</sup> nor do the words, "I agree in the above conveyance."<sup>4</sup>

If a wife having an estate in fee executes a deed of it with her husband, both joining in the granting part of the deed, the fact that the wife also releases dower and homestead in the granted premises does not restrict her conveyance to these interests, but the deed passes the title of the wife in fee.<sup>5</sup>

<sup>1</sup> *Hall v. Savage*, 4 Mason, 273; *Greenough v. Turner*, 11 Gray, 332; *Learned v. Cutler*, 18 Pick. 9; *Leavitt v. Lamprey*, 13 Pick. 382, 23 Am. Dec. 685; *Lufkin v. Curtis*, 13 Mass. 223; *Catlin v. Ware*, 9 Mass. 218; *Stevens v. Owen*, 25 Me. 94; *Lothrop v. Foster*, 51 Me. 367; *Cox v. Wells*, 7 Blackf. 410, 43 Am. Dec. 98; *Davis v. Bartholomew*, 3 Ind. 485.

<sup>2</sup> *Burge v. Smith*, 27 N. H. 332, 337. In explanation of this usage, Bell, J., after speaking of the different rule in Massachusetts and Maine, and of the fact that pretty early in provincial times their courts consisted, in part at least, of men educated as lawyers, said: "In New Hampshire it was much later before the courts were either composed of educated

lawyers, or were materially aided by an educated bar; and it is probably owing to this circumstance that the custom became established here, that the wife may release her dower by her signature and seal at the foot of her husband's deed, without her name being in any other way mentioned or alluded to in the instrument. Such is found, by an examination of the records of deeds, to be a very common mode of conveyance among the unprofessional magistrates, by whom a large part of the conveyances are made in this State."

<sup>3</sup> *Stevens v. Owen*, 25 Me. 94.

<sup>4</sup> *Hall v. Savage*, 4 Mason, 273.

<sup>5</sup> *Smith v. Carmody*, 137 Mass. 126; *Stone v. Montgomery*, 35 Miss. 83.

## CHAPTER XVIII.

### DESCRIPTION AND BOUNDARIES.

I. Certainty, 320-334.	V. General and particular descriptions, 410-423.
II. Parol evidence, 335-353.	VI. References to maps and surveys, 424-447.
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#### I. *Certainty.*

**320. In General.** The description of the parcels follows immediately after the operative words, and should contain all the particulars necessary to clearly and accurately identify the property, such as its situation in a town and county named, its boundaries, their measurements, and the total area. A house in a town is usually described as situate in a particular street or road, and the dimensions of the lot of land are usually given in linear feet. The street number of the house is a useful particular. Land in the country is usually described by reference to government surveys, or to private surveys of the particular property. A plan should be annexed or referred to when practicable. The boundaries are often fixed by reference to the land of adjoining owners. Boundaries are sometimes determined by reference to fixed monuments, or by their distance from streets or natural or permanent objects. A reference to the occupancy of the property by a former owner, or by a tenant, is often a useful means of identification.

Resort may be had to other parts of a deed to aid in determining what property the deed was intended to convey. Thus, a recital in a settlement of an intention to settle property in a particular county was allowed to limit words in the description which included all the settler's property.<sup>1</sup>

Deeds purporting to convey lands, which do not describe or designate the lands, are invalid for uncertainty.<sup>2</sup>

<sup>1</sup> *Jenner v. Jenner*, L. R. 1 Eq. 361.

<sup>2</sup> *Wilson v. Johnson (Ind.)*, 38 N. E.

321. The situation of the land, as regards the State, county, town, or locality in which the land is located, must be mentioned in the deed, or indicated sufficiently to enable one to determine the location of the land; but if, taking all the facts which appear upon the face of the deed, and the legal presumptions which naturally flow from these facts, the true locality may be determined by the aid of proper averments and extrinsic proof, the deed will not be void for uncertainty.<sup>1</sup> Thus, where a deed commenced with the words, "State of Tennessee, Lawrence County," and the land was described as lying on a certain creek in Lawrence County, and the deed was acknowledged before the clerk of the county court of Lawrence County, it was held that it sufficiently appeared by the deed, coupled with the grantee's averment that the land intended to be conveyed was situated in Lawrence County, in the State of Tennessee, to entitle him to show the facts by extrinsic proof.<sup>2</sup> There is a presumption, in the absence of anything in the instrument to the contrary, that the land is in the State in which the parties reside and in which they execute the deed.<sup>3</sup> This presumption is one of fact and may be rebutted by oral evidence.<sup>4</sup>

If there is a mistake in the deed as to the general location of the land, though the description is perfect, parol evidence is ad-

Rep. 38; *Buchanan v. Whitman*, 36 Ind. 257; *Shoemaker v. McMonigle*, 86 Ind. 421.

<sup>1</sup> *Bryan v. Wisner*, 44 La. Ann. 832, 11 So. Rep. 290; *Calton v. Lewis*, 119 Ind. 181, 21 N. E. Rep. 475; *Dutch v. Boyd*, 81 Ind. 146; *Noland v. Wasson*, 115 Ind. 529, 18 N. E. Rep. 26; *Banks v. Ammon*, 27 Pa. St. 172; *Wilt v. Cutler*, 38 Mich. 189; *Black v. Pratt Coal & Coke Co.* 85 Ala. 504, 5 So. Rep. 89; *Walker v. Moses*, 113 N. C. 527, 18 S. E. Rep. 339.

Thus, in a conveyance by an administrator which leaves the location of the land in doubt, this may be determined by reference to maps, to land certificates giving the location and description of surveys, district numbers, patents, and the like, and by reference, also, to proceedings had in the administration and partition of the estate; *Kerlicks v. Keystone Land Co.* (Tex.) 21 S. W. Rep. 623.

<sup>2</sup> *Calton v. Lewis*, 119 Ind. 181, 21 N. E. Rep. 475, 476, per Mitchell, J.: "If, therefore, the name of the State was omitted through the negligence or inadvertence of the parties, or of the scrivener who prepared the deed, or if it was supposed that the State in which the land was situated was sufficiently identified by the caption to the deed, it does not constitute a mistake of law of which the grantor can avail himself when asked to respond for a breach of the covenants contained in the deed. In a case like the present it is not essential to the grantee's right to recover damages for a breach of the covenant of seisin that there should first be a reformation of the deed. The deed not being void, it is only necessary that, under proper averments, the identity of the land described in the deed be proved."

<sup>3</sup> *Dutch v. Boyd*, 81 Ind. 146; *Homan v. Stewart* (Ala.), 16 So. Rep. 35.

<sup>4</sup> *Mead v. Parker*, 115 Mass. 413.

missible to identify the land, and the erroneous general location may be rejected as surplusage.<sup>1</sup>

When land is described according to the system of the public land surveys of the United States, the description is sufficient though the county and State or Territory in which the land is situated be not given, for judicial notice is taken of such surveys.<sup>2</sup> If the county or school district in which the land is situated be given, with a particular description by metes and bounds, though the section and township be omitted, the location can be identified.<sup>3</sup> But if there is nothing in the deed to indicate the township, range, or county in which the land is situated, and this is described only by the number and subdivisions of a section, the description is void on its face.<sup>4</sup>

**322. A misnomer of the city, town, or county in which the land is situate does not invalidate the deed if the description is sufficient to identify the land.**<sup>5</sup> Thus, where land is described as being in a certain city, but by a prior change of the city limits is in fact in another town, and the grantor is seised thereof when the conveyance is made, and the land can be identified by the description in the deed, the deed is valid.<sup>6</sup> It was contended in this case that the name of a town is such an essential and material part of the description in a deed that it cannot be controlled by the language of the rest of the description. But this is too broad a contention. The general rule on this subject is thus stated by Chief Justice Parsons:<sup>7</sup> "It seems to be a general rule

<sup>1</sup> *Myers v. Ladd*, 26 Ill. 415; *Lochte v. Austin*, 69 Miss. 271, 13 So. Rep. 838; *Armstrong v. Colby*, 47 Vt. 359.

<sup>2</sup> *Carson v. Railsback*, 3 Wash. T. 168, 13 Pac. Rep. 618; *Beal v. Blair*, 33 Iowa, 318; *Mee v. Benedict*, 98 Mich. 260, 57 N. W. Rep. 175.

<sup>3</sup> *Fuller v. Fellows*, 30 Ark. 657; *Gordon v. Goodman*, 98 Ind. 269.

<sup>4</sup> *Dorr v. School District*, 40 Ark. 237; *Haughton v. Sartor* (Miss.), 15 So. Rep. 71, overruling *Foute v. Fairman*, 48 Miss. 536.

<sup>5</sup> *Perry v. Clark*, 157 Mass. 330, 32 N. E. Rep. 226; *Stringer v. Young*, 3 Pct. 320; *Lamb v. Reaston*, 1 Marsh. C. P. 23.

<sup>6</sup> *Perry v. Clark*, *supra*; and see *Preston v. Robinson*, 24 Vt. 583.

<sup>7</sup> *Worthington v. Hylyer*, 4 Mass. 196, 205. These remarks, says Lathrop, J., in *Perry v. Clark*, *supra*, were undoubtedly founded on *Doddington's Case*, 2 Coke, 32, where the distinction was drawn between general and particular words of grant, and it was said: "And therefore, when the general words of patent do not comprehend content, number, nature, quality, certain name, nor any convenient certainty of the land, but the town is the principal thing which restrains the generality of the grant, and reduces it to a certainty, it would be dangerous to extend the same out of the town comprised in the grant. . . . But it is otherwise when any grant doth comprehend any convenient certainty, as of a manor, farm, land known

that, when the description of the estate intended to be conveyed included several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree to every particular of the description. Thus, if a man grant all his estate in his own occupation in the town of W., no estate can pass except what is in his own occupation, and is also situate in that town. But if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected."

323. The first requisite of an adequate description is that the land shall be identified with reasonable certainty, but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain.<sup>1</sup> A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey.<sup>2</sup> The office of a description is not to identify the land,

by a certain name, or containing so many acres," etc., "so as there may appear in the letters patent some convenient certainty of the thing which the king intended to pass." The cases of *King v. Little*, 1 Cush. 436, and *Cook v. Babcock*, 7 Cush. 526, are clearly distinguishable from *Perry v. Clark*, *supra*. "In *King v. Little* the grantor was possessed of real estate in two towns, and gave a deed of quitclaim of land in one, describing it as being the same bequeathed by his father to the children of the releasor. The will devised lands in both towns, and it was held that the description was to be confined to land in the town mentioned. In *Cook v. Babcock* the question was one of boundary. The land was described as being in the town of Blandford, and as bounded 'north on the line of said Blandford.' The deed was given after the line of Blandford had been established by an act of the legislature. It was held that the line so established was the northern boundary of the land conveyed, and that parol evidence

was inadmissible to show that, before the act of the legislature, the line of Blandford was understood and reputed to be farther north than the line so established, and was defined by a line of marked trees, and that the parties to the deed understood that it was intended to convey the land to this line." Per Lathrop, J.

<sup>1</sup> *United States v. King*, 3 How. 773, 787; *Thompson v. Motor Road Co.* 82 Cal. 497, 23 Pac. Rep. 130; *Austin v. Dolbee* (Mich.), 59 N. W. Rep. 608; *Kyle v. Rhodes*, 71 Miss. 487, 15 So. Rep. 40; *Smith v. Greaves*, 15 Lea, 459; *Steinbeck v. Stone*, 53 Tex. 382; *Norris v. Hunt*, 51 Tex. 609; *Knowles v. Torbitt*, 53 Tex. 557; *Bowles v. Brice*, 66 Tex. 724, 2 S. W. Rep. 729; *Cantagrel v. Von Lupin*, 58 Tex. 570; *Peart v. Brice*, 152 Pa. St. 277, 25 Atl. Rep. 537; *Winnipisiogee Paper Co. v. N. H. Lead Co.* 59 Fed. Rep. 542.

<sup>2</sup> *Calton v. Lewis*, 119 Ind. 181, 21 N. E. Rep. 475; *Works v. State*, 120 Ind. 119, 22 N. E. Rep. 127; *Bowen v. Gallo-way*, 98 Ill. 41.

but to furnish the means of identification.<sup>1</sup> The description will be liberally construed to afford the basis of a valid grant.<sup>2</sup> It is only when it remains a matter of conjecture what property was intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels.<sup>3</sup>

If the description is sufficient to allow of identification by an actual survey, it will be upheld, however indefinite it may seem to be.<sup>4</sup> But if the description is so vague that the parcel cannot be located under it, it is void for uncertainty. If the starting-point of a boundary line cannot be identified, the deed is necessarily void.<sup>5</sup> A description which omits one or more of the boundaries, and leaves the quantity of land undetermined, is insufficient.<sup>6</sup>

A description in a deed which consists only of the words, "a piece or parcel of land near Bacon Quarter Branch," is too vague and indefinite to create a right of property in any particular parcel of land.<sup>7</sup>

**324.** It is a rule that, if possible, a deed shall be so con-

<sup>1</sup> *Works v. State*, 120 Ind. 119, 22 N. E. Rep. 127, per Elliott, C. J.; *Rucker v. Steelman*, 73 Ind. 396; *Burrow v. Railroad Co.* 107 Ind. 432, 8 N. E. Rep. 167; *Collins v. Dressler*, 133 Ind. 290, 32 N. E. Rep. 883; *Thorn v. Phares*, 35 W. Va. 771, 14 S. E. Rep. 399.

<sup>2</sup> *Hannon v. Hilliard*, 101 Ind. 310, 316; *Calton v. Lewis*, 119 Ind. 181, 21 N. E. Rep. 475.

<sup>3</sup> *Roehl v. Haumesser*, 114 Ind. 311, 314, 15 N. E. Rep. 345; *Calton v. Lewis*, 119 Ind. 181, 21 N. E. Rep. 475; *Tryon v. Huntoon*, 67 Cal. 325, 7 Pac. Rep. 741; *People v. Klumpke*, 41 Cal. 263; *Williams v. Western Union Ry. Co.* 50 Wis. 71, 5 N. W. Rep. 482; *Jackson v. Roosevelt*, 13 Johns. 97; *Harkness v. Devine*, 73 Tex. 628, 11 S. W. Rep. 872.

To give a deed any sensible operation, it must describe the subject-matter of the conveyance so as to denote upon the instrument what it is in particular, or by a reference to something else which will render it certain. The want of such a description or reference in a deed is a de-

fect which renders it totally inoperative. *Kea v. Robeson*, 5 Ired. Eq. 373.

<sup>4</sup> *Oxford v. White*, 95 N. C. 525; *Smiley v. Fries*, 104 Ill. 416; *Fowler v. People*, 93 Ill. 116; *Pennington v. Flock*, 93 Ind. 378; *Meikel v. Greene*, 94 Ind. 344; *Guy v. Barnes*, 29 Ind. 103; *Reid v. Mitchell*, 95 Ind. 397; *Brown v. Anderson*, 90 Ind. 93; *Campbell v. Carruth*, 32 Fla. 264, 13 So. Rep. 432; *Goodbar v. Dunn*, 61 Miss. 618; *Throckmorton v. Moon*, 10 Ohio, 42; *Thompson v. So. Cal. M. R. Co.* 82 Cal. 497, 23 Pac. Rep. 130.

<sup>5</sup> *Le France v. Richmond*, 5 Sawyer, 601; *Archibald v. Davis*, 5 Jones, 322; *Pry v. Pry*, 109 Ill. 466; *Deaver v. Jones*, 114 N. C. 649, 19 S. E. Rep. 637.

<sup>6</sup> *Island Coal Co. v. Streitlemier (Ind.)*, 37 N. E. Rep. 340.

<sup>7</sup> *George v. Bates*, 90 Va. 839, 20 S. E. Rep. 828. See, also, *Capps v. Holt*, 5 Jones Eq. 153; *Westfall v. Cottrills*, 24 W. Va. 763; *Clark v. Chamberlin*, 112 Mass. 19; *Lumbard v. Aldrich*, 8 N. H. 31; *Munnink v. Jung*, 3 Tex. Civ. App. 395, 22 S. W. Rep. 293; *Peart v. Brice*, 11 Pa. Co. Ct. 606, 1 Pa. Dist. Ct. 713, 152 Pa. St. 277.

strued that no part shall be rejected.<sup>1</sup> Effect shall be given to the intent of the parties as indicated by the whole instrument.<sup>2</sup> This rule is of course subordinate to the general rule that nothing will pass by a deed except what is described in it, whatever the intention of the parties may have been.<sup>3</sup> The description as it stands in the deed is presumed to be as the parties intended it, until it is clearly made to appear that a mistake exists. Every word is to have effect, and to be harmonized with the rest of the description, if this is possible.

The punctuation of a deed is not to be regarded in its construction.<sup>4</sup>

Where there is doubt or uncertainty arising from the terms of the description in a deed, or in the application thereof to the subject-matter, the court may place itself in the position of the grantee, and read it in the light of the circumstances under which it was executed, and may consider the condition of the property, state of the title, boundaries, or other material matters in aid of its interpretation.<sup>5</sup>

A description that may be rendered certain by averment is not void for uncertainty.<sup>6</sup>

<sup>1</sup> *Jones v. Pashby*, 62 Mich. 614, 29 N. W. Rep. 374; *Moran v. Lezotte*, 54 Mich. 83, 19 N. W. Rep. 757; *Thatcher v. St. Andrews Church*, 37 Mich. 264; *Wharton v. Brick*, 49 N. J. L. 289, 8 Atl. Rep. 529; *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. Rep. 551; *Cleveland v. Sims*, 69 Tex. 153, 6 S. W. Rep. 634; *Miller v. Bryan*, 86 N. C. 167; *Shultz v. Young*, 3 Ired. L. 385, 40 Am. Dec. 413; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. Rep. 1033; *Osborne v. Anderson*, 89 N. C. 261; *Alton v. Illinois Transp. Co.* 12 Ill. 38, 52 Am. Dec. 479; *More v. Massini*, 37 Cal. 432; *Moore v. Griffin*, 22 Me. 350; *Herrick v. Hopkins*, 23 Me. 217; *Cilley v. Childs*, 73 Me. 130; *Simpson v. Blaisdell*, 85 Me. 199, 27 Atl. Rep. 101; *Richardson v. Palmer*, 38 N. H. 212; *Lane v. Thompson*, 43 N. H. 320; *Johnson v. Simpson*, 36 N. H. 91, 94; *Harris v. Hull*, 70 Ga. 831; *Parkinson v. McQuaid*, 54 Wis. 473, 11 N. W. Rep. 682; *Buffalo, N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348; *Law v. Hempstead*, 10 Conn. 23.

<sup>2</sup> *Cannon v. Emmons*, 44 Minn. 294, 46 N. W. Rep. 356.

<sup>3</sup> *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. Rep. 615; *Coleman v. Manhattan Beach Co.* 94 N. Y. 229.

<sup>4</sup> *Thatcher v. St. Andrew's Church*, 37 Mich. 264.

<sup>5</sup> *Cannon v. Emmons*, 44 Minn. 294, 46 N. W. Rep. 356; *Witt v. Railway Co.* 38 Minn. 127, 35 N. W. Rep. 862; *Austrian v. Davidson*, 21 Minn. 117; *Everett v. Insurance Co.* 21 Minn. 76; *Driscoll v. Green*, 59 N. H. 101, 104; *Crafts v. Hibbard*, 4 Met. 438; *Jackson v. Marsh*, 6 Cow. 281; *Walsh v. Hill*, 38 Cal. 481; *Thompson v. Railway Co.* 82 Cal. 497, 23 Pac. Rep. 130; *Haynes v. Heller*, 12 Kan. 381; *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. Rep. 22; *Denver, &c. Ry. Co. v. Lockwood (Kans.)*, 38 Pac. Rep. 794.

<sup>6</sup> *Pence v. Armstrong*, 95 Ind. 191; *Mettart v. Allen (Ind.)*, 39 N. E. Rep. 239.

**325. Nothing passes by a deed except what is described in it, whatever the intention of the parties may have been.**<sup>1</sup> Though parol evidence is often admissible to ascertain what lands are embraced in the description, such evidence cannot make the deed operate upon land not embraced in the descriptive words.<sup>2</sup> A deed described the land conveyed as beginning at a certain rock, and running thence one mile east, one mile north, one mile west, and one mile south, to the place of beginning, and also stated that it was the land set off to a certain Indian under a treaty with the government. The Indian had previously selected his land as "a tract one mile square, the exact boundaries of which may be defined when the surveys are made." After the deed was given, the Indian's land was located and patented so as to include a section not in the form of a square, no part of which lay within the boundaries named in said deed. It was held that the deed, being for a specific tract of land, could not be construed to convey the grantor's interest in the land actually patented to the Indian.<sup>3</sup>

That one parcel or some portion of the lands is not described with sufficient certainty does not invalidate the deed as to other parcels that are sufficiently described.<sup>4</sup>

**326. An erroneous description will not vitiate a deed which also contains an adequate and sufficiently certain description.** Thus, a needless and erroneous mention of an incident in the history of the title has no effect as against an adequate description of the property by metes and bounds. The erroneous statement may be rejected, and the deed will have effect according to the remaining description.<sup>5</sup> In Sheppard's Touchstone<sup>6</sup> it is said:

<sup>1</sup> *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. Rep. 615; *Coleman v. Manhattan Beach Co.* 94 N. Y. 229; *Jones v. Smith*, 73 N. Y. 205; *Andren v. Watkins*, 26 Fla. 390, 7 So. Rep. 876; *Minor v. Powers* (Tex.), 26 S. W. Rep. 1071, reversing 24 S. W. Rep. 710.

<sup>2</sup> *Doe v. Holtom*, 4 Ad. & El. 76; *Coleman v. Manhattan Beach Co.* 94 N. Y. 229; *Minor v. Powers* (Tex.), 26 S. W. Rep. 1071.

<sup>3</sup> *Prentice v. Northern Pac. R. Co.* 43 Fed. Rep. 270; *Prentice v. Duluth Stor-*

*age Co.* 58 Fed. Rep. 437; *Prentice v. Stearns*, 20 Fed. Rep. 819, 113 U. S. 435, 5 Sup. Ct. Rep. 547.

<sup>4</sup> *Tatum v. Tatum*, 81 Ala. 388, 1 So. Rep. 195.

<sup>5</sup> *Miller v. Travers*, 8 Bing. 244; *Llewellyn v. Earl of Jersey*, 11 M. & W. 183; *Land Co. v. Saunders*, 103 U. S. 316, 322; *Prentice v. Stearns*, 113 U. S. 435, 5 S. Ct. Rep. 547; *Hamm v. San Francisco*, 17 Fed. Rep. 119; *Lodge v. Lee*, 6 Cranch, 237; *Jackson v. Sprague*, 1 Paine, 494. *Alabama*: *Chadwick v. Carson*, 78 Ala. 116;

<sup>6</sup> *Shep. Touch. marg. p. 247.* And see *Wilcoxson v. Sprague*, 51 Cal. 640.



"If one grant all his lands which he hath in D in this manner, 'all my lands in D which I had of the grant of I S,' this is a good grant of all his lands in D, albeit he had them not of the

Clements v. Pearce, 63 Ala. 284. **California**: Irving v. Cunningham, 66 Cal. 15; Wade v. Deray, 50 Cal. 376; Reamer v. Nesmith, 34 Cal. 624; Reed v. Spicer, 27 Cal. 57; Wilcoxson v. Sprague, 51 Cal. 640. **Colorado**: Murray v. Hobson, 10 Colo. 66, 13 Pac. Rep. 921. **Connecticut**: Sherwood v. Whiting, 54 Conn. 330, 8 Atl. Rep. 80. **Illinois**: Myers v. Ladd, 26 Ill. 415; Kruse v. Wilson, 79 Ill. 233; Stevens v. Wait, 112 Ill. 544; Bowen v. Allen, 113 Ill. 53; Holston v. Needles, 115 Ill. 461, 5 N. E. Rep. 530; White v. Hermann, 51 Ill. 243, 99 Am. Dec. 543; **Indiana**: Kinsey v. Satterthwaite, 88 Ind. 342. **Louisiana**: Bryan v. Wisner, 44 La. Ann. 832, 11 So. Rep. 290. **Maine**: Vose v. Handy, 2 Me. 322, 11 Am. Dec. 101. Cate v. Thayer, 3 Me. 71; Keith v. Reynolds, 3 Me. 393; Andrews v. Pearson, 68 Me. 19; Getchell v. Whittemore, 72 Me. 393; Chandler v. Green, 69 Me. 350; Jones v. Buck, 54 Me. 301; Abbott v. Abbott, 53 Me. 356; Maker v. Lazell, 83 Me. 562, 22 Atl. Rep. 474; Hobbs v. Payson, 85 Me. 498, 27 Atl. Rep. 519. **Maryland**: Bay v. Posner (Md.), 29 Atl. Rep. 11. **Massachusetts**: Hastings v. Hastings, 110 Mass. 280; Eliot v. Thatcher, 2 Met. 44; Bond v. Fay, 12 Allen, 86; Bosworth v. Sturtevant, 2 Cush. 392; Parks v. Loomis, 6 Gray, 467; Worthington v. Hylyer, 4 Mass. 196; Waterman v. Johnson, 13 Pick. 261; Melvin v. Proprietors of Locks and Canals, 5 Met. 15, 38 Am. Dec. 384; Morse v. Rogers, 118 Mass. 572, 578; Auburn Cong. Church v. Walker, 124 Mass. 69; Lovejoy v. Lovett, 124 Mass. 270; Cassidy v. Charlestown Savings Bank, 149 Mass. 325, 327, 21 N. E. Rep. 372. **Michigan**: Wiley v. Lovely, 46 Mich. 83, 8 N. W. Rep. 716; Wilt v. Cutler, 38 Mich. 189. **Mississippi**: Lochte v. Austin, 69 Miss. 271, 13 So. Rep. 838. **Missouri**: Union Ry. & T. Co. v. Skinner, 9 Mo. App. 189; West v. Bretelle, 115 Mo. 653, 22 S. W. Rep. 705; Evans v. Greene, 21 Mo. 170; Shewalter v. Pirner, 55 Mo. 218; Gibson v. Bogy, 28 Mo. 478; Jamison v. Fopiano, 48 Mo. 194; Rutherford v. Tracy, 48 Mo. 325, 8 Am. Rep. 104; Bray v. Adams, 114 Mo. 486, 21 S. W. Rep. 853. **New Hampshire**: Benton v. McIntyre, 64 N. H. 598, 15 Atl. Rep. 413; Harvey v. Mitchell, 31 N. H. 575; Johnson v. Simpson, 36 N. H. 91; Thompson v. Ela, 60 N. H. 562; White v. Gay, 9 N. H. 126, 31 Am. Dec. 224; Driscoll v. Green, 59 N. H. 101; Eastman v. Knight, 35 N. H. 551; Winnipisiogee Paper Co. v. N. H. Land Co. 59 Fed. Rep. 542, 547, per Aldrich, J. **New York**: Case v. Dexter, 106 N. Y. 548, 13 N. E. Rep. 449; Jackson v. Baringer, 15 Johns. 471; Jackson v. Clark, 7 Johns. 217; Loomis v. Jackson, 19 Johns. 449; Robinson v. Kime, 70 N. Y. 147; Baldwin v. Brown, 16 N. Y. 359; Danziger v. Boyd, 21 J. & S. 398; Schoenewald v. Rosenstein, 25 N. Y. St. Rep. 964, 5 N. Y. Supp. 766; Muldoon v. Deline, 135 N. Y. 150, 31 N. E. Rep. 1091. **North Carolina**: Proctor v. Pool, 4 Dev. 370; Simpson v. King, 1 Ired. Eq. 11; Shaffer v. Hahn, 111 N. C. 1, 15 S. E. Rep. 1033; British & Am. Mort. Co. v. Long, 113 N. C. 123, 18 S. E. Rep. 165. **Ohio**: Merrick v. Merrick, 37 Ohio St. 126, 41 Am. Rep. 493. **Oregon**: Raymond v. Coffey, 5 Oreg. 132. **Pennsylvania**: Duncan v. Madara, 106 Pa. St. 562. **Texas**: Coffey v. Hendricks, 66 Tex. 676; Barnard v. Good, 44 Tex. 638; Kingston v. Pickins, 46 Tex. 99; Smith v. Chatham, 14 Tex. 322; Oliver v. Mahoney, 61 Tex. 610; Robinson v. Doss, 53 Tex. 496; Peterson v. Ward (Tex. Civ. App.), 23 S. W. Rep. 637; Arambula v. Sullivan, 80 Tex. 615, 16 S. W. Rep. 436; Minor v. Powers (Tex.), 24 S. W. Rep. 710; Birds-eye v. Rogers (Tex. Civ. App.), 26 S. W. Rep. 841. **Wisconsin**: Green Bay v. Hewitt, 55 Wis. 96, 12 N. W. Rep. 382; Thompson v. Jones, 4 Wis. 106.

grant of I S, but of the grant of another. But if the words be, 'all my lands which I had by the grant of I S in D,' in this case the grant is not good to carry any other lands in D but such as he had of the grant of I S. So, if one grants in this manner, 'all my manor of sale in Dale, which I had by descent,' and in truth he had it not by descent but by purchase, this is a good grant of the manor." In case there are two inconsistent descriptions equally explicit, that will control which best expresses the intention of the parties as manifested by the whole instrument.<sup>1</sup>

**327.** A court of law can correct a description only by way of a construction of the language used, and with a view to carry out the manifest intention of the grantor. One part of a description cannot be rejected merely because it is inconsistent with another part. If the ambiguity is patent, the deed is void. But if from the whole deed it appears that the intention of the grantor can evidently be carried out by the rejection of a repugnant clause or word, this can be done by construction in a court of law; otherwise the parties must seek a court of equity, where alone a deed can be reformed.<sup>2</sup>

A mistake in naming the owner of lands, when the real owner conveys it, is immaterial. Thus a deed by a married woman, properly describing land which she had inherited from her father, is not invalidated by her describing it as land which her husband had inherited from her father.<sup>3</sup>

**328.** The maxim, *falsa demonstratio non nocet*, is not applicable unless the descriptive phrase to be suppressed is clearly repugnant to other and more important parts of the description. To justify the suppression of a part of a description, this must not only be out of harmony with other parts of the description, but it must be undeniably so, in some important respect, after

<sup>1</sup> *Driscoll v. Green*, 59 N. H. 101; *Rep.* 394; *West v. Bretelle*, 115 Mo. 653, *White v. Gay*, 9 N. H. 126, 31 Am. Dec. 22 S. W. Rep. 705; *Gibson v. Bogy*, 28 Mo. 224; *Lane v. Thompson*, 43 N. H. 320; 478; *Rutherford v. Tracy*, 48 Mo. 325, *Allen v. Holton*, 20 Pick. 458, 463, per 8 Am. Rep. 104; *Jennings v. Brizeadine*, *Wilde, J.*; *Wade v. Deray*, 50 Cal. 376; 44 Mo. 332; *King v. Fink*, 51 Mo. 209; *More v. Massini*, 37 Cal. 432; *Benedict v. Gaylord*, 11 Conn. 332, 29 Am. Dec. 299; *Raymond v. Coffey*, 5 Oreg. 132; *Pirner*, 55 Mo. 218. *Bond v. Fay*, 8 Allen, 212, 12 Allen, 86.

<sup>2</sup> *Boardman v. Reed*, 6 Pet. 328; *Ford v. Unity Church*, 120 Mo. 498, 25 S. W.

<sup>3</sup> *Grant v. Armstrong (Ky.)*, 16 S. W. Rep. 531.

putting a reasonable construction upon the rest of the description. Words of general description will not always prevail over an enumeration of particulars; for, in cases where there is an enumeration of particulars, which on their face purport to be designed as qualifications or restrictions of a preceding general description, the general description must yield to the particular description.<sup>1</sup>

**329.** After an accurate description, an inaccurate description following which is merely accumulative will be rejected.<sup>2</sup> If land be described by a name which is applicable to the whole of it, a subsequent description, which appears to be merely a second description, and in fact covers only a part of the land first described, does not affect the general description, but will be rejected.<sup>3</sup> But if the further descriptive phrase restricts or qualifies the general terms of the description, effect must be given to the words of restriction or qualification.

<sup>1</sup> *Evens v. Griscom*, 40 N. J. L. 402, 42 N. J. L. 579. In this case the words were: "All that my farm and plantation near Cropwell conveyed to me by the heirs of my deceased wife, and where my son Thomas now resides, containing about eighty-five acres, more or less." The testator's farm near Cropwell, whereon his son Thomas resided, embraced in fact fourteen acres, which had not been conveyed to him by the heirs of his wife, but had come to him from an entirely different source. Consequently the words "conveyed to me by the heirs of my deceased wife" stood in direct incompatibility with two other descriptions of the lands intended to be devised, namely, "all that my farm near Cropwell," and "where" or wherever "my son Thomas now resides;" so that a case was presented which compelled the court to decide whether the words "conveyed to me by the heirs of my deceased wife" were a mere false description, or were used to restrict the generality of the language of both a previous and subsequent description. It was held that these words restricted the general description, and were not to be suppressed. This case is commented upon and approved in *Kanouse v. Slockbower*, 48 N. J. Eq. 42,

21 Atl. Rep. 197, where Van Fleet, V.-C., states it to this effect: "Whenever the testator's intention to give the whole as an entirety clearly appears from the language of the will, whether such intention is expressed by a designation, by a name, or by abutments, or other descriptive words, additional words of description which prove to be only partially true will be rejected as a misdescription. But it is not true that words of general description will always prevail over an enumeration of particulars; for, in cases where there is an enumeration of particulars, which on their face purport to be designed as qualifications or restrictions of a preceding general description, there the general description must yield to the particular description. This rule has its root in that great principle which declares that in construing wills the court must, if possible, give effect to every word of the will."

<sup>2</sup> *Cassidy v. Charlestown Savings Bank*, 149 Mass. 325, 327, 21 N. E. Rep. 372.

<sup>3</sup> *Chamberlaine v. Turner*, Cro. Car. 129; *Down v. Down*, 7 Taunt 343; *Ela v. Card*, 2 N. H. 175; *Drew v. Drew*, 28 N. H. 489; *Crosby v. Bradbury*, 20 Me. 61; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251, 42 N. J. L. 579.

**330. A manifest omission in a description may be supplied by construction when the deed furnishes sufficient data for this purpose.<sup>1</sup> In like manner a manifest error, such as an error in the number of a lot or block of land, may be corrected by the data supplied by the deed.<sup>2</sup> The omission of one of the boundary lines, or of a call in a survey, does not necessarily render the description void; for the remaining line may be determined by the lines given, and, if need be, the description may be aided by extrinsic evidence.<sup>3</sup>**

**331. A reference for description to other deeds or title papers is equivalent to incorporating the full descriptions set forth in such papers, and competent evidence is admissible to locate the land so described.<sup>4</sup> Of course the reference to such deeds or title papers must be specific. A reference in general terms to the records of the county for a description is without effect.<sup>5</sup> If a deed referred to be fully identified, it is immaterial that it has not been recorded in the county in which it is recited in the reference as having been recorded.<sup>6</sup> A deed of a parcel of land secured to the grantor by letters patent of a certain quantity of land situated in a named land-district of Texas, "on the waters of the Brazos River, and fully described in the foot-notes of said patent," contains a description sufficient to convey the land described in the patent, though the latter was not in fact issued to**

<sup>1</sup> *Deal v. Cooper*, 94 Mo. 62; *Hoffman v. Riehl*, 27 Mo. 554; *Burnett v. McCluey*, 78 Mo. 676; *Edwards v. Bowden*, 99 N. C. 80; *Moss v. Shear*, 30 Cal. 467; *Campbell v. Carruth*, 32 Fla. 264, 13 So. Rep. 432.

<sup>2</sup> *Murray v. Hobson*, 10 Colo. 66, 13 Pac. Rep. 921.

<sup>3</sup> *Montgomery v. Carlton*, 56 Tex. 431; *Johnson v. Williams*, 67 Hun, 652, 22 N. Y. Supp. 247.

<sup>4</sup> *Robinson v. Brennan*, 115 Mass. 582; *Waterman v. Andrews*, 14 R. I. 589; *Miller v. Topeka Land Co.* 44 Kans. 354, 24 Pac. Rep. 420; *Davidson v. Arledge*, 88 N. C. 326; *Euliss v. McAdams*, 108 N. C. 507, 13 S. E. Rep. 162; *Everitt v. Thomas*, 1 Ired. 252; *Walker v. Moses*, 113 N. C. 527, 18 S. E. Rep. 339; *Powers v. Jackson*, 50 Cal. 429; *Caldwell v. Center*, 30 Cal. 539; *Clamorgan v. Hornsby*, 94

Mo. 83, 6 S. W. Rep. 651; *Clamorgan v. Badger & St. L. Ry. Co.* 72 Mo. 139; *Dolde v. Vodicka*, 49 Mo. 98; *Nelson v. Brodhack*, 44 Mo. 596; *Hays v. Perkins*, 109 Mo. 102, 18 S. W. Rep. 1127; *Catlett v. Starr*, 70 Tex. 485, 7 S. W. Rep. 844; *Bowles v. Beal*, 60 Tex. 322; *Steinbeck v. Stone*, 53 Tex. 382; *Cleveland v. Sims*, 69 Tex. 153, 6 S. W. Rep. 634; *Bratton v. Adams* (Tex. Civ. App.), 26 S. W. Rep. 1108; *Henry v. Whitaker*, 82 Tex. 5, 17 S. W. Rep. 509; *Gresham v. Chambers*, 80 Tex. 544, 16 S. W. Rep. 326; *Kyle v. Rhodes*, 71 Miss. 487, 15 So. Rep. 40; *Hoffman v. Port Huron* (Mich.), 60 N. W. Rep. 831; *Rupert v. Penner*, 35 Neb. 587, 53 N. W. Rep. 598; *Newman v. Tymeson*, 13 Wis. 172.

<sup>5</sup> *Brown v. Chambers*, 63 Tex. 131.

<sup>6</sup> *Saunders v. Schmaelzle*, 49 Cal. 59.

the grantor till the lapse of several months after the execution of the deed.<sup>1</sup>

A deed which describes land only by the number of acres in the parcel, and as lying on the north and east side of a specified lot, but subject to the dower of a widow named, "which has been laid off and assigned to her for life in said lot of land," is not void for uncertainty; for there is a plain reference to the proceedings by which dower was assigned to the widow, and the import of the deed is to convey the reversion to the identical parcel embraced in the assignment of dower.<sup>2</sup>

A deed referring accurately to another deed made to the grantor, and conveying all the parcels of land therein described not already disposed of, sufficiently describes such land.<sup>3</sup> A description of land in a certain town or county, or on a certain river, and simply by the name under which the property is known, is a sufficiently certain and definite description, when supplemented by proper parol identification.<sup>4</sup>

A deed describing land as "all that certain interest in the landed estates of H, deceased, to which we are or may be entitled by gift, devise, or descent, or otherwise," describes the property conveyed with sufficient certainty.<sup>5</sup> But a deed of land described as "inherited" from a certain person is not sufficient to embrace land which the grantor received by devise under the will of such person.<sup>6</sup>

**332.** A reference to another deed for a description may control a description by metes and bounds, when the latter is inaccurate according to the manifest intention of the parties to the deed. Thus, where one purchased a dwelling-house and lot by

<sup>1</sup> *Norton v. Conner* (Tex.), 14 S. W. Rep. 193. And see *Bitner v. New York & Tex. Land Co.* 67 Tex. 341, 3 S. W. Rep. 301. A description of land by reference to "the title of possession as given by George A. Nixon, especial commissioner for Joseph Vehelin's colony, of which the said Mardes was a colonist," is sufficient. *Mardes v. Meyers* (Tex. Civ. App.), 28 S. W. Rep. 693.

<sup>2</sup> *Parler v. Johnson*, 81 Ga. 254, 7 S. E. Rep. 317.

<sup>3</sup> *Falls Land, &c. Co. v. Chisholm*, 71 Tex. 523, 9 S. W. Rep. 479; *Steinbeck*

*v. Stone*, 53 Tex. 382; *Bitner v. N. Y. & Tex. Land Co.* 67 Tex. 341, 8 S. W. Rep. 301; *Gresham v. Chambers*, 80 Tex. 544, 16 S. W. Rep. 326.

<sup>4</sup> *Bogan v. Hamilton*, 90 Ala. 454, 8 So. Rep. 186; *O'Neal v. Seixas*, 85 Ala. 80, 4 So. Rep. 745; *Liles v. Ratchford*, 88 Ala. 397, 6 So. Rep. 914.

<sup>5</sup> *Harris v. Broiles* (Tex. Civ. App.), 22 S. W. Rep. 421. And see *Austin v. Bolbee* (Mich.), 59 N. W. Rep. 608.

<sup>6</sup> *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. Rep. 356.

a deed correctly describing the land, and afterwards gave a mortgage in which the description by metes and bounds did not cover a strip two feet wide along one side of the premises, but stated that they were the same premises conveyed to the mortgagor by duly recorded deed of a certain date, being the purchase-deed referred to, it was held that the purchaser at foreclosure of such mortgage obtained title to the entire premises described in the deed to the mortgagor; though the complaint, the decree, and the deed to such purchaser at the foreclosure sale omitted that part of the description in the mortgage which referred to the mortgagor's purchase-deed.<sup>1</sup>

**333. An immaterial recital does not estop the parties from denying its truth.** Thus, in the description of lands excepted from a conveyance, a recital that such lands had been conveyed to another does not estop the grantor, nor any one to whom he may convey the excepted lands, from alleging that no such conveyance had in fact been made.<sup>2</sup>

<sup>1</sup> *Bernstein v. Nealis* (N. Y.), 39 N. E. Rep. 328, reversing 19 N. Y. Supp. 739. Peckham, J., said: "In this case the specific description is slightly inaccurate, and in fact it cuts off two feet from a house and lot, the whole of which, beyond all possible controversy, was intended to be conveyed. By reason of this inaccuracy in the description by metes and bounds, if unsided by the added statement, the clear intention of the mortgagor to mortgage the whole might fail. But when such added statement is referred to, all doubt is removed, and by combining the two, the special and particular description with the statement as to what it actually conveys, all the land described in the Floyd deed must be held to pass under the description in the mortgage. The statement, in the light of the character of the property, means all the premises contained in the Floyd deed, and not a part only. The doubt in this case arises from the fact that in proceeding to foreclose the mortgage the complaint, decree, and referee's deed described the premises by the particular description contained in the mortgage, and did not refer to the statement in the mortgage beginning, 'being

the same premises,' etc. As to the mortgagor, however, and his grantees subsequent to the mortgage, the particular description was sufficient to convey the premises as they actually existed. . . . When the mortgagee comes to foreclose the mortgage, therefore, he may take the mortgagor at his word, and may rely upon it, and assume that the particular description does convey the same premises conveyed to the mortgagor by the Floyd deed; and the added statement in the mortgage need not be inserted in the complaint or in the decree, or in the deed of the referee, in order to convey, as against the mortgagor, the same premises that were conveyed to the mortgagor by the Floyd deed."

<sup>2</sup> *South E. Ry. Co. v. Warton*, 6 Hurl. & N. 519; *Carpenter v. Buller*, 8 M. & W. 209; *Reed v. McCourt*, 41 N. Y. 435; *Amba v. Chicago, St. Paul, M. & O. Ry. Co.* 44 Minn. 266, 46 N. W. Rep. 321; *Great Falls Co. v. Worster*, 15 N. H. 412; *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Ingersoll v. Truebody*, 40 Cal. 603; *Baldwin v. Thompson*, 15 Iowa, 504.

334. A description which in itself does not identify the land may be cured by the acts of the parties.<sup>1</sup> Thus where one conveyed three hundred acres out of a much larger tract, directing that it be laid off in a convenient form, and the grantee entered into possession of that quantity of land out of the larger tract, and continued in possession for many years, and then conveyed the land so occupied by metes and bounds, the last grantee cannot object that the deed to his grantor was void because it did not sufficiently identify the land.<sup>2</sup> A conveyance of a certain number of acres of land to be selected out of a larger tract by the grantee is not void for uncertainty,<sup>3</sup> but no title to any specific land passes until the selection is made; and, if the selection be not made within twenty years, the grantee's right is barred.<sup>4</sup> If the parties to a deed which does not describe the property with certainty, either before or after the date of the same, mark out or identify and appropriate certain land as the exact and identical parcel conveyed, or to be conveyed, by such deed, it will be held to be effective to convey such land. Their declarations and acts at the time of the conveyance may be proved to determine the intent of the parties.<sup>5</sup> Thus, where a grantor conveys a wharf property by clear and definite description, and then adds to the description the following words, "Also one half of an acre of land near the wharf, or at the wharf," the deed will be regarded as effective to convey a particular half acre near the wharf which the parties to the deed, near the time of its execution, surveyed or otherwise marked out and appropriated.<sup>6</sup>

<sup>1</sup> *Vejar v. Mound City Asso.* 97 Cal. 659, 32 Pac. Rep. 713; *Mulford v. Le Franc*, 26 Cal. 88; *McNamara v. Seaton*, 82 Ill. 498; *Mettart v. Allen* (Ind.), 39 N. E. Rep. 239; *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. Rep. 551; *Richards v. Snider*, 11 Oreg. 197, 3 Pac. Rep. 117.

<sup>2</sup> *Smith v. Bradley* (Ky.), 11 S. W. Rep. 370.

<sup>3</sup> *Pond v. Minnesota Iron Co.* 58 Fed. Rep. 448; *Dohoney v. Womack* (Tex.), 19 S. W. Rep. 883; *Nye v. Moody*, 70 Tex. 434, 8 S. W. Rep. 606; *Waters v. Bew* (N. J.), 29 Atl. Rep. 590.

<sup>4</sup> *Dull v. Blum*, 68 Tex. 299, 4 S. W. Rep. 489.

<sup>5</sup> *Harris v. Oakley*, 130 N. Y. 1, 28 N.

E. Rep. 530; *Donahue v. Case*, 61 N. Y. 631; *Clark v. Wethey*, 19 Wend. 320.

<sup>6</sup> *Simpson v. Blaisdell*, 85 Me. 199, 27 Atl. Rep. 101; *Farrar v. Cooper*, 34 Me. 394. In the first-named case, Chief Justice Peters, delivering the decision upon the point whether the land had been defined, said: "It can be defined by the parties going down with the surveyor and surveying it off and putting down marks. It can be defined in other ways, perhaps. It need not be done necessarily by both parties being upon the ground at the time. If George Hinman went upon the land himself, and began to use a half acre, — a well-defined half acre, — marked it out by piling paving all over a well-defined

What is the practical construction given to a doubtful description by the subsequent acts of the parties may be proved by parol evidence.<sup>1</sup> But a description which is clear and unambiguous cannot be set aside and a different one substituted in its place by parol proof of the acts of the parties, either before or after the execution of the deed.<sup>2</sup>

On the other hand, if it appears that certain land was not claimed by the grantee as being embraced in the grant; that he conveyed all the land definitely granted, but did not attempt to convey the land in question; and that the grantor, the Commonwealth of Massachusetts, did subsequently authorize a location on such land, — these contemporaneous and subsequent acts of the parties are sufficient evidence that such land was not included in the grant.<sup>3</sup>

## II. *Parol Evidence.*

**335.** Where the description is clear and intelligible, parol evidence is not admissible to control the legal effect of it, but a construction must be put upon the terms used.<sup>4</sup> In that case the

half acre, or in any other way; if he began to use it in that way, so as to make it clear and distinct that he was appropriating a certain specific half acre under his deed, and the grantor knew it and saw it, and acquiesced therein for a number of years, — that would be evidence from which the jury might infer that it had been in that way marked out and appropriated, but it would not be conclusive."

<sup>1</sup> *Lovejoy v. Lovett*, 124 Mass. 270; *Stone v. Clark*, 1 Met. 378, 35 Am. Dec. 370.

<sup>2</sup> *Ames v. Hilton*, 70 Me. 36.

<sup>3</sup> *Roberts v. Richards*, 84 Me. 1, 24 Atl. Rep. 425.

<sup>4</sup> **Alabama:** *Guilmartin v. Wood*, 76 Ala. 204. **California:** *Hogins v. Boggs*, (Cal.), 34 Pac. Rep. 653. **Connecticut:** *Benedict v. Gaylord*, 11 Conn. 332, 336, 29 Am. Dec. 299. **Florida:** *Andreu v. Watkins*, 26 Fla. 390, 7 So. Rep. 876. **Illinois:** *Bradish v. Yocum*, 130 Ill. 386, 23 N. E. Rep. 114. **Maine:** *Ames v. Hilton*, 70 Me. 36. **Massachusetts:** *Miles v. Barrows*, 122 Mass. 579; *Waterman v. Johnson*, 13 Pick. 261, 264, per Shaw, C. J.; *Bond v. Fay*, 12 Allen, 86. **Minne-**

**sota:** *Beardsley v. Crane*, 52 Minn. 537, 54 N. W. Rep. 740. **Missouri:** *Jennings v. Brizeadine*, 44 Mo. 332. **New Hampshire:** *Coburn v. Coxeter*, 51 N. H. 158; *Hall v. Davis*, 36 N. H. 569; *Sanborn v. Clough*, 40 N. H. 316; *Prescott v. Hawkins*, 12 N. H. 19. **New York:** *Harris v. Oakley*, 130 N. Y. 1, 28 N. E. Rep. 530, per Haight, J.; *Brookman v. Kurzman*, 94 N. Y. 272, 276; *Lawrence v. Palmer*, 71 N. Y. 607; *Green v. Collins*, 86 N. Y. 246, 254, 40 Am. Rep. 531; *Drew v. Swift*, 46 N. Y. 204; *Partridge v. Russell*, 18 N. Y. St. Rep. 685, 2 N. Y. Supp. 529. **Oregon:** *Meier v. Kelly*, 20 Oreg. 86, 25 Pac. Rep. 73; *Holcomb v. Mooney*, 13 Oreg. 503, 11 Pac. Rep. 274. **Texas:** *Farley v. Weslande*, 69 Tex. 458, 6 S. W. Rep. 786; *Anderson v. Stamps*, 19 Tex. 460; *Williams v. Winslow*, 84 Tex. 371, 19 S. W. Rep. 513; *Hartz v. Owen* (Tex. Civ. App.), 27 S. W. Rep. 42. **Rhode Island:** *Segar v. Babcock*, 18 R. I. 188, 26 Atl. Rep. 257. **Virginia:** *Norfolk Trust Co. v. Foster*, 78 Va. 413. **Wisconsin:** *Kirch v. Davies*, 55 Wis. 287, 11 N. W. Rep. 689.



description cannot be changed or varied by construction, although it is plain that this description is not the description that was intended to be used. The construction must be confined to the intention of the parties as gathered from the deed.<sup>1</sup> Thus, where a description was clear and exact, giving metes and bounds, but, as applied to the land, conveyed a lot adjoining the land of the grantor, it was held that parol evidence could not be introduced to show that the grantor intended to convey his own lot, though his deed referred to the deed by which he acquired title, which deed correctly described the land intended to be conveyed; for there was no ambiguity in the description by metes and bounds, and the clause referring to the prior deed did not create any ambiguity in the prior description, but was repugnant to it.<sup>3</sup>

If, on inspection of the deed, the identity of the land is altogether uncertain, the court should pronounce the deed void.<sup>3</sup>

**336. Proof of the intention of the grantor is inadmissible to explain a deed which is on its face void for uncertainty,<sup>4</sup> or to enlarge or change the meaning or import of the words used in the deed.<sup>5</sup> When the parties have reduced their contract to writing in the form of a deed, this is taken to be the final expression of their intention, and extrinsic evidence cannot be employed to show that their intention was different from what is expressed on the face of the deed.<sup>6</sup> If the land intended to be conveyed**

<sup>1</sup> *Cunningham v. Thornton*, 28 Ill. App. 58; *Johnson Co. v. Wood*, 84 Mo. 489; *Armstrong v. Du Bois*, 90 N. Y. 95; *Clark v. Baird*, 9 N. Y. 183; *Meier v. Kelly*, 20 Oreg. 86, 25 Pac. Rep. 73; *Holston Salt Co. v. Campbell* (Va.), 16 S. E. Rep. 274; *Rugg v. Waril*, 64 Vt. 402, 23 Atl. Rep. 726. *Ross, C. J.*, said: "If the application of the description to the subject-matter manifests that all its terms cannot exactly be fulfilled, and that by rejection of nearly equal portions of the description, by varying the courses or shortening or lengthening the distances in two or more ways, the description becomes applicable, and it is uncertain which is the one intended by the parties, oral testimony may be received to remove the uncertainty."

<sup>2</sup> *Cassidy v. Charlestown Sav. Bank*, 149 Mass. 325, 21 N. E. Rep. 372.

<sup>3</sup> *Cox v. Hart*, 145 U. S. 376, 12 Sup.

Ct. Rep. 962; *Kingston v. Pickins*, 46 Tex. 99, 101; *Wilson v. Smith*, 50 Tex. 365, 369.

<sup>4</sup> *Bond v. Fay*, 12 Allen, 86, affirming 8 Allen, 212; *Gaston v. Weir*, 84 Ala. 193, 4 So. Rep. 258; *Meyer v. Mitchell*, 75 Ala. 475; *Driggers v. Cassady*, 71 Ala. 529; *Chambers v. Ringstaff*, 69 Ala. 140; *Clements v. Pearce*, 63 Ala. 284; *Jennings v. Brizeadine*, 44 Mo. 332; *Wells v. Jackson Iron Co.* 47 N. H. 235; *Muldoon v. Deline*, 135 N. Y. 150, 31 N. E. Rep. 1091.

<sup>5</sup> *Green v. Collins*, 86 N. Y. 246, 40 Am. Rep. 531; *Marshall v. Gridley*, 46 Ill. 247; *Segar v. Babcock*, 18 R. I. 188, 26 Atl. Rep. 257.

<sup>6</sup> *Bond v. Fay*, 12 Allen, 86; *Benedict v. Gaylord*, 11 Conn. 332, 29 Am. Dec. 299; *Payne v. Atterbury*, Har. Ch. 414; *May v. Tillman*, 1 Mich. 262; *White v.*

can be ascertained from the deed itself by rejecting a part of the description manifestly false, resort should not be had to extraneous evidence.<sup>1</sup> A grantor is not allowed to contradict his deed or to vary the description of the land thereby conveyed.<sup>2</sup>

**337. An ambiguity which is patent on the face of the deed renders the instrument void.** Parol evidence is not in that case admissible to aid the description.<sup>3</sup> Thus, if a deed conveys a part of a larger tract, without affording any means of determining what part of such tract is intended, as for instance forty acres out of a quarter section of one hundred and sixty acres,<sup>4</sup> there is a patent ambiguity which parol evidence cannot aid. For the same reason, a deed of a tract of land in a county named adjoining the lands of two persons named is void, if the land is part of a larger tract belonging to the grantor; but if the land so described be not a part of a larger tract, and the quantity be given, the ambiguity is not patent and the land may be located by parol evidence.<sup>5</sup>

Smith, 37 Mich. 291; Shotwell v. Harrison, 22 Mich. 410; Case v. Green, 53 Mich. 615, 19 N. W. Rep. 554; Thompson v. Smith, 96 Mich. 258, 55 N. W. Rep. 886; Gordon v. Trimmier, 91 Ga. 472, 18 S. E. Rep. 404; Holston Salt Co. v. Campbell, 89 Va. 396, 16 S. E. Rep. 274.

<sup>1</sup> Schoenewald v. Rossenstein, 25 N. Y. St. Rep. 964, 5 N. Y. Supp. 766; Brookman v. Kurtzman, 94 N. Y. 272; Masten v. Olcott, 101 N. Y. 152, 4 N. E. Rep. 274; Case v. Dexter, 106 N. Y. 548, 13 N. E. Rep. 449; Coffey v. Hendricks, 66 Tex. 676, 2 S. W. Rep. 47; Bond v. Fay, 12 Allen, 86, 8 Allen, 212; Benedict v. Gaylord, 11 Conn. 332, 29 Am. Dec. 299.

<sup>2</sup> Harding v. Wright, 119 Mo. 1, 24 S. W. Rep. 211; Jennings v. Brizeadine, 44 Mo. 332; Jones v. Shepley, 90 Mo. 307, 2 S. W. Rep. 400.

<sup>3</sup> Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. Rep. 962; Boardman v. Reed, 6 Pet. 328. **Alabama:** Chambers v. Ringstaff, 69 Ala. 140. **Arkansas:** Fuller v. Fellows, 30 Ark. 657. **California:** Mesick v. Sunderland, 6 Cal. 297; Brandon v. Ledy, 67 Cal. 43, 7 Pac. Rep. 33. **Illinois:** Fisher v. Quackenbush, 83 Ill. 310; Fry v. Fry, 109 Ill. 466. **Mississippi:** Brown

v. Guice, 46 Miss. 299. **Missouri:** Campbell v. Johnson, 44 Mo. 247; Hardy v. Matthews, 38 Mo. 121; Jennings v. Brizeadine, 44 Mo. 332; King v. Fink, 51 Mo. 209. **North Carolina:** Dickens v. Barnes, 79 N. C. 490; Hinchey v. Nichols, 72 N. C. 66. **Texas:** Wilson v. Smith, 50 Tex. 365; Kingston v. Pickins, 46 Tex. 99; Norris v. Hunt, 51 Tex. 609; Steinbeck v. Stone, 53 Tex. 382; Ragsdale v. Robinson, 48 Tex. 379, 395; Knowles v. Torbitt, 53 Tex. 557; Giddings v. Day, 84 Tex. 605, 19 S. W. Rep. 682; Curdy v. Stafford (Tex. Civ. App.), 27 S. W. Rep. 823; Wooters v. Arledge, 54 Tex. 395; Mitchell v. Ireland, 54 Tex. 301; Allday v. Whitaker, 66 Tex. 671, 1 S. W. Rep. 794; Linney v. Wood, 66 Tex. 22, 17 S. W. Rep. 244. **Wisconsin:** Johnson v. Ashland Lumber Co. 52 Wis. 458, 9 N. W. Rep. 464.

<sup>4</sup> Campbell v. Johnson, 44 Mo. 247. Also Allen v. Chambers, 4 Ired. Eq. 125, the words "to be laid off" in this case indicating that the land was part of a larger tract. Grier v. Rhyne, 69 N. C. 346.

<sup>5</sup> Perry v. Scott, 109 N. C. 374, 14 S. E. Rep. 294; Hinton v. Roach, 95 N. C.

And so a deed of land "except such portion as has been laid out in town lots, and sold prior to the execution of the mortgage," which does not show which lots had been sold, is void for uncertainty, and cannot be aided by extrinsic evidence.<sup>1</sup>

A deed of "one tract of land lying and being in the county aforesaid, adjoining the lands of A and B, containing twenty acres, more or less," is sufficient to pass the title to any land, and the description cannot be aided by parol proof.<sup>2</sup>

**338. Extrinsic evidence is always admissible to explain any uncertainty or latent ambiguity there may be in the description in the deed, so as to make it apply to the parcel intended to be conveyed, and give effect to the deed.<sup>3</sup> Thus, where a**

106; *Wharton v. Eborn*, 88 N. C. 344; *Edwards v. Bowden*, 99 N. C. 80, 5 S. E. Rep. 283; *McGlawhorn v. Worthington*, 98 N. C. 199, 3 S. E. Rep. 633.

In *Dickens v. Barnes*, 79 N. C. 490, the description, "one tract of land lying and being in the county aforesaid, adjoining the lands of John J. Phelps and Norfleet Pender, containing twenty acres, more or less," was held to be insufficient to admit the aid of parol evidence. But it has been intimated that this decision is overruled by *Farmer v. Bates*, 83 N. C. 387. In *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. Rep. 891, a deed of "fifty acres of land lying in the county of Hertford, and bounded as follows," by the lands of three persons named, left open for explanation by parol proof only the question whether there was a tract so bounded as to separate it from other tracts, and indicate its limits with reasonable certainty. In this case and in the case of *Wilson v. Johnson*, 105 N. C. 211, 10 S. E. Rep. 895, a distinction is taken between the words "bounded" and "adjoining," which is repudiated in *Perry v. Scott*, 109 N. C. 374, 14 S. E. Rep. 294.

<sup>1</sup> *Bowen v. Wickersham*, 124 Ind. 404, 24 N. E. Rep. 983.

<sup>2</sup> *Dickens v. Barnes*, 79 N. C. 490.

<sup>3</sup> **Alabama:** *Guilmartin v. Wood*, 76 Ala. 204. **Arkansas:** *Dorr v. School District*, 40 Ark. 237. **California:** *Thompson v. Motor Road Co.* 82 Cal. 497, 23

Pac. Rep. 130; *Reamer v. Nesmith*, 34 Cal. 624; *Vejar v. Mound City Assn.* 97 Cal. 659, 32 Pac. Rep. 713. **Colorado:** *Murray v. Hobson*, 10 Colo. 66, 13 Pac. Rep. 921; *Blair v. Bruns*, 8 Colo. 397, 8 Pac. Rep. 569. **Connecticut:** *Benedict v. Gaylord*, 11 Conn. 332, 29 Am. Dec. 299. **Georgia:** *Shore v. Miller*, 80 Ga. 93, 4 S. E. Rep. 561. **Illinois:** *Mason v. Merrill*, 129 Ill. 503, 21 N. E. Rep. 799; *Chicago Dock Co. v. Kinzie*, 93 Ill. 415; *Bradish v. Yocum*, 130 Ill. 386, 23 N. E. Rep. 114; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Fisher v. Quackenbush*, 83 Ill. 310; *Colcord v. Alexander*, 67 Ill. 581; *Billings v. Kankakee Coal Co.* 67 Ill. 489; *Bybee v. Hageman*, 66 Ill. 519; *Marshall v. Gridley*, 46 Ill. 247; *Stevens v. Wait*, 112 Ill. 544; *Smith v. Crawford*, 81 Ill. 296. **Indiana:** *Trentman v. Neff*, 124 Ind. 503, 24 N. E. Rep. 895. **Kentucky:** *Shelby v. Teris (Ky.)*, 14 S. W. Rep. 501. **Maine:** *Tyler v. Fickett*, 73 Me. 410. **Massachusetts:** *Reynolds v. Boston Rubber Co.* 160 Mass. 240, 34 N. E. Rep. 677; *Macdonald v. Morrill*, 154 Mass. 270, 28 N. E. Rep. 259; *Crafts v. Hibbard*, 4 Met. 438; *Stone v. Clark*, 1 Met. 378, 35 Am. Dec. 370; *Waterman v. Johnson*, 13 Pick. 261; *Kellogg v. Smith*, 7 Cush. 375, 382; *Dodd v. Witt*, 139 Mass. 63, 66, 29 N. E. Rep. 475, 52 Am. Rep. 700; *Lovejoy v. Lovett*, 124 Mass. 270; *Miles v. Barrows*, 122 Mass. 579, 581; *Hooten v. Comerford*, 152 Mass. 591, 26 N. E. Rep. 407, 23 Am.

right of way over certain lots of land was described as laid out by a civil engineer named, in accordance with a map attached to the deed, and the map did not identify the location apart from the survey on the ground, explanatory evidence was admitted to prove that the map was made from an actual survey, and to show the location of the way as surveyed upon the ground.<sup>1</sup> Where a description applies to two or more parcels equally well, there is a latent ambiguity which may be explained by parol.<sup>2</sup>

A latent ambiguity occurs when the deed or other instrument appears sufficiently certain, free from ambiguity, but the ambiguity is produced by something extrinsic, or some collateral matter out of the instrument. Where a description is apparently clear and complete, yet when it is applied to the land it appears that the words are applicable to different things, and there is nothing in the deed to show which is meant, extrinsic evidence is admissible to show the true meaning of the words used.<sup>3</sup> "The iden-

St. Rep. 861. **Michigan**: *Heffelman v. Otsego Water Power Co.* 78 Mich. 121, 43 N. W. Rep. 1096, 44 N. W. Rep. 1151. **Mississippi**: *Price v. Ferguson*, 66 Miss. 404; *Brown v. Guice*, 46 Miss. 299. **Missouri**: *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. Rep. 551; *Charles v. Patch*, 87 Mo. 450. **Nebraska**: *Hanlon v. Union Pac. Ry. Co.* 40 Neb. 52, 58 N. W. Rep. 590. **New Jersey**: *Scott v. Yard*, 46 N. J. Eq. 79, 18 Atl. Rep. 359; *Dunn v. English*, 23 N. J. L. 126; *Smith v. Negbauer*, 42 N. J. L. 305; *Opdyke v. Stephens*, 28 N. J. L. 83. **New Mexico**: *Gentile v. Crossan* (N. M.), 38 Pac. Rep. 247. **New York**: *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. Rep. 615; *Weeks v. Martin*, 10 N. Y. Supp. 656; *Clark v. Wethey*, 19 Wend. 320; *Vosburgh v. Teator*, 32 N. Y. 561; *Wood v. Lafayette*, 46 N. Y. 484; *Stout v. Woodward*, 5 Hun. 340, affirmed 71 N. Y. 590; *Donahue v. Case*, 61 N. Y. 631; *Case v. Dexter*, 106 N. Y. 548, 13 N. E. Rep. 449; *Harris v. Oakley*, 130 N. Y. 1, 28 N. E. Rep. 530, reversing 7 N. Y. Supp. 232. **North Carolina**: *Allen v. Sallinger*, 108 N. C. 159, 12 S. E. Rep. 896; *Radford v. Edwards*, 88 N. C. 347. **Oregon**: *Hicklin v. McClear*, 19 Oreg. 508, 22 Pac. Rep. 1057; *Kanne v. Otty*, 25 Oreg. 531, 36

Pac. Rep. 537. **Pennsylvania**: *Hughes v. Westmoreland Coal Co.* 104 Pa. St. 207; *Palmer v. Farrell*, 129 Pa. St. 162, 18 Atl. Rep. 761. **Texas**: *Kingston v. Pickens*, 46 Tex. 99; *Coffey v. Hendricks*, 66 Tex. 676, 2 S. W. Rep. 47; *Norris v. Hunt*, 51 Tex. 609; *Clark v. Gregory* (Tex. Civ. App.), 26 S. W. Rep. 244; *Linney v. Wood*, 66 Tex. 22, 17 So. Rep. 244; *Dwyre v. Speer* (Tex. Civ. App.), 27 S. W. Rep. 585. **Vermont**: *Patch v. Keeler*, 28 Vt. 332; *Hull v. Fuller*, 7 Vt. 100; *Clary v. McGlynn*, 46 Vt. 347; *Pingry v. Watkins*, 17 Vt. 379; *Rugg v. Ward*, 64 Vt. 402, 23 Atl. Rep. 726. **Wisconsin**: *Lego v. Medley*, 79 Wis. 211, 48 N. W. Rep. 375; *Lyman v. Babcock*, 40 Wis. 503. See, also, *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659; *Prentiss v. Brewer*, 17 Wis. 635; *Rockwell v. Insurance Co.* 21 Wis. 548; and *Sawyer v. Insurance Co.* 37 Wis. 503. **Washington**: *Squire v. Greer*, 2 Wash. 209, 26 Pac. Rep. 222.

<sup>1</sup> *Thompson v. Motor Road Co.* 82 Cal. 497, 23 Pac. Rep. 130.

<sup>2</sup> *Clark v. Powers*, 45 Ill. 283.

<sup>3</sup> "Ambiguitas patens," says Lord Bacon, "is that which appears to be ambiguous upon the deed or instrument;

tical monument or boundary referred to in a deed is always a subject of parol evidence, and, when disputed, it is always left to the jury to say what was the actual monument intended. Thus there may be two trees of a similar species and with similar marks; two similar stakes not far distant from each other; or two rivers of the same name; and which was intended by the deed would be settled by parol evidence, on the ground that it is a latent ambiguity."<sup>1</sup> A boundary line was described as drawn from a house named, and reference was made to a map for a more particular description. On the map referred to the line appeared to be drawn from the northeast corner of the house. It appeared in evidence that the position of the house was incorrectly represented upon the map. It was held, however, that the trial judge was bound to look to the map as forming part of the deed, and to tell the jury that the line was to be drawn as marked on the map.<sup>2</sup>

*latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." *Bacon's Tracts*; *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. Rep. 617, 710; *Holcomb v. Mooney*, 13 Oreg. 503, 507, 11 Pac. Rep. 274; *Fisher v. Quackenbush*, 83 Ill. 310; *Kingston v. Pickins*, 46 Tex. 99; *Masterson v. Todd*, 6 Tex. Civ. App. 131, 24 S. W. Rep. 682; *Brooks v. Britt*, 4 Dev. L. 481; *Thornell v. Brockton*, 141 Mass. 151, 6 N. E. Rep. 74.

In *Minor v. Powers* (Tex.), 24 S. W. Rep. 710, *Fisher, C. J.*, said: "The instrument itself may not disclose any uncertainty or doubt, and may upon its face give a perfect description; but in an attempt to apply it, when it is found that the description will apply to two or more objects or subjects, or is a misdescription of the object or subject intended by the conveyance, a latent ambiguity results, and evidence is admissible to explain and remove it."

In *Gentile v. Crossan* (N. M.), 38 Pac. Rep. 247, a deed described a boundary as follows: "Y del camino a las lomas;" meaning, "And from the road to [las

lomas] the hills." There was strong evidence that "las lomas" signified, in that vicinity, a certain kind of hills. It was held that the use of the term constituted a latent ambiguity which could be explained by parol evidence.

<sup>1</sup> *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88, per *Woodbury, J.* To like effect, see *Coe v. Ritter*, 86 Mo. 277; *Thacker v. Howell* (Ky.), 26 S. W. Rep. 719; *Dorr v. School District*, 40 Ark. 237; *Greeley v. Weaver* (Me.), 13 Atl. Rep. 575; *Hoar v. Goulding*, 116 Mass. 132.

<sup>2</sup> *Lyle v. Richards*, 1 L. R. H. L. 222, 241. Lord Westbury dissented, on the ground that, it being ascertained that the house itself was incorrectly laid down on the map, it was impossible to know by an examination of the deeds, or by their construction alone, from what corner of the house the boundary line was to be drawn; that consequently there was a latent ambiguity, which was to be determined by evidence, and was not dependent on construction. He said: "But the question here is not of the interpretation of the deed itself, nor even of the construction of the description of the parcels, but of the inference to be derived from a map as to the relative position of two objects

Where there is a reservation or exception of one acre of land, from the southwest corner of the land described, "together with the buildings thereon," and the grantor remained in possession of all the buildings, he could show that one square acre in the southeast corner of the land would not include all the buildings reserved by him, and that it was intended to reserve an acre of such shape as would include them.<sup>1</sup>

**339. Parol evidence is admissible to apply the description to the parcel intended to be conveyed, when the terms used in the deed leave it uncertain what property was intended to be embraced in it.<sup>2</sup> Such evidence cannot be used to enlarge the scope of the descriptive words, but only to fit them to the land intended to be described.<sup>3</sup> But the deed must itself point to the source from which evidence *aliunde* to make the description com-**

laid down as adjoining each other, where one is proved to be erroneously laid down. As soon as that proof was admitted, it became obvious that the true position in nature of the thing erroneously laid down, and the true relative position of the adjoining objects, must both be ascertained by external evidence." The dissenting opinion seems to be the better opinion.

<sup>1</sup> *Lego v. Medley*, 79 Wis. 211, 48 N. W. Rep. 375.

<sup>2</sup> *Cox v. Hart*, 145 U. S. 376, 12 Sup. Ct. Rep. 962; *Brown v. Cranberry Iron Co.* 59 Fed. Rep. 434, 437. **California:** *Reamer v. Nesmith*, 84 Cal. 624; *Thompson v. Southern Cal. M. R. Co.* 82 Cal. 497, 23 Pac. Rep. 130. **Colorado:** *Murray v. Hobson*, 10 Colo. 66, 13 Pac. Rep. 921. **Florida:** *Andreu v. Watkins*, 26 Fla. 390, 7 So. Rep. 876. **Georgia:** *Gress Lumber Co. v. Coody* (Ga.), 21 S. E. Rep. 217. **Illinois:** *Cunningham v. Thornton*, 28 Ill. App. 58; *Mason v. Merrill*, 129 Ill. 503, 21 N. E. Rep. 799; *Myers v. Ladd*, 26 Ill. 415; *Smith v. Crawford*, 81 Ill. 296. **Iowa:** *Judd v. Anderson*, 51 Iowa, 346, 1 N. W. Rep. 677. **Massachusetts:** *Waterman v. Johnson*, 13 Pick. 261. **Minnesota:** *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. Rep. 147. **Mississippi:** *Lochte v. Austin*, 69 Miss. 271, 13 So. Rep. 838. **Missouri:** *Charles v. Patch*, 87 Mo. 450; *Bray v. Adams*, 114 Mo.

486, 21 S. W. Rep. 853; *Skinker v. Haagsma*, 99 Mo. 208. **North Carolina:** *Robbins v. Harris*, 96 N. C. 557, 2 So. Rep. 70; *Wellons v. Jordan*, 83 N. C. 371; *Walker v. Moses*, 113 N. C. 527, 18 S. E. Rep. 339. **Oregon:** *Meier v. Kelly*, 20 Ore. 86, 25 Pac. Rep. 73; *Raymond v. Coffey*, 5 Ore. 132. **Pennsylvania:** *Brown v. Willey*, 42 Pa. St. 205; *Peart v. Brice*, 152 Pa. St. 277, 25 Atl. Rep. 537; *Ferguson v. Staver*, 33 Pa. St. 411; *Smith's Appeal*, 69 Pa. St. 474. **Texas:** *McWhirter v. Allen*, 1 Tex. Civ. App. 649, 20 S. W. Rep. 1007; *Cox v. Rust* (Tex. Civ. App.), 29 S. W. Rep. 807; *Giddings v. Day*, 84 Tex. 605, 19 S. W. Rep. 682; *Kingston v. Pickins*, 46 Tex. 99; *Wilson v. Smith*, 50 Tex. 365; *Brown v. Chambers*, 63 Tex. 131; *Koepsel v. Allen*, 68 Tex. 446, 4 S. W. Rep. 856; *Overand v. Menczer*, 83 Tex. 122, 18 S. W. Rep. 301; *Watson v. Baker*, 71 Tex. 739, 9 S. W. Rep. 867; *Cook v. Oliver*, 83 Tex. 559, 19 S. W. Rep. 161; *Gresham v. Chambers*, 80 Tex. 544, 16 S. W. Rep. 326; *Flanagan v. Bogress*, 46 Tex. 330. **Vermont:** *Wead v. St. Johnsbury, &c. R. Co.* 64 Vt. 52, 24 Atl. Rep. 361. **Virginia:** *Hunter v. Hume*, 88 Va. 24, 13 S. E. Rep. 305.

<sup>3</sup> *Harrison v. Hahn*, 95 N. C. 28; *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. Rep. 891; *Stiles v. Estabrooks*, 66 Vt. 535, 29 Atl. Rep. 961.

plete is to be sought.<sup>1</sup> This may sometimes be done by the use of a single word, as for instance where the language used is *my* farm, or *my* homestead.<sup>2</sup>

The question of the application of a description to its proper subject-matter is for the jury, who may have the aid of all competent extrinsic evidence.<sup>3</sup> The question of the identity of the location is always one of fact for the jury.<sup>4</sup>

The construction of the terms used in a deed, aside from extraneous evidence, is for the court.<sup>5</sup> It is, however, the province of the jury to determine the boundaries in controversy from all the evidence, including the description in the deed.<sup>6</sup>

**340. Parol evidence is admissible to show the position of monuments and boundary marks mentioned in a deed,<sup>7</sup> or fixed by the parties at the time or soon afterwards. Where land has been actually surveyed, and stakes set at the corners, it is competent to prove by parol their location, and, if lost or destroyed, the**

<sup>1</sup> *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. Rep. 891; *Massey v. Belisle*, 2 Ired. 170; *Coker v. Roberts*, 71 Tex. 597, 9 S. W. Rep. 665; *Black v. Pratt Coal & C. Co.* 85 Ala. 504, 5 So. Rep. 89; *Gaston v. Weir*, 84 Ala. 193, 4 So. Rep. 258; *Norris v. Hunt*, 51 Tex. 609; *Cleveland v. Sims*, 69 Tex. 153, 6 S. W. Rep. 634; *Bitner v. Land Co.* 67 Tex. 341, 3 S. W. Rep. 301.

<sup>2</sup> *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. Rep. 891; *Murdock v. Anderson*, 4 Jones Eq. 77; *Carson v. Ray*, 7 Jones, 609, 78 Am. Dec. 267; *Brown v. Coble*, 76 N. C. 391.

But in *Perry v. Scott*, 109 N. C. 374, 14 S. E. Rep. 294, it is declared that the necessity for the presence of the word "my" or "my lands" in such description in conveyances by the owner, as indicated in several of the older cases, seems to be no longer recognized, and their immateriality is distinctly declared in *Farmer v. Batts*, 83 N. C. 387, where Smith, C. J., says that "the assertion of title in the vendor is not less unequivocally involved in the very act of disposing of it as his property." It would, indeed, seem but charitable to assume that he who undertakes to convey property in-

tends to dispose of what he claims to be his own.

<sup>3</sup> *Thompson on Trials*, § 1461; *Steigleder v. Marshall*, 159 Pa. St. 77, 28 Atl. Rep. 240; *Kingston v. Pickens*, 46 Tex. 99; *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. Rep. 886.

<sup>4</sup> *Steigleder v. Marshall*, 159 Pa. St. 77, 28 Atl. Rep. 240; *Keizer v. Beemer* (Pa.), 13 Atl. Rep. 909; *Oliver v. Brown*, 80 Me. 542, 15 Atl. Rep. 599.

<sup>5</sup> *Cox v. Hart*, 145 U. S. 376, 12 Sup. Ct. Rep. 962; *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. Rep. 886; *Robinson v. Jones*, 2 Tex. Civ. App. 316, 22 S. W. Rep. 15; *Wilson v. Smith*, 50 Tex. 365, 369.

<sup>6</sup> *Cochran v. Smith*, 73 Hun, 597, 26 N. Y. Supp. 103.

<sup>7</sup> *Noonan v. Lee*, 2 Black, 499; *Bagley v. Morrill*, 46 Vt. 94; *Robinson v. Kime*, 70 N. Y. 147; *Tyler v. Fickett*, 73 Me. 410; *Linscott v. Fernald*, 5 Me. 496; *Strickland v. Draughan*, 88 N. C. 315; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88; *Benton v. Horsley*, 71 Ga. 619; *Borer v. Lange*, 44 Minn. 281, 46 N. W. Rep. 358; *Anderson v. Richardson*, 92 Cal. 623, 28 Pac. Rep. 679; *Minor v. Kirkland* (Tex. Civ. App.), 20 S. W. Rep. 932.

places where they were set.<sup>1</sup> But if such corners and monuments can be determined by the field-notes of the government survey of the land, they are not so unknown or uncertain as to allow the admission of parol evidence to locate them.<sup>2</sup> If the means are at hand to establish the line, and a competent surveyor could locate it, it is not uncertain in a legal sense.<sup>3</sup> Resort must often be had to the existing circumstances, and to the construction put upon the description by the parties interested, to ascertain where on the face of the earth the monuments and lines described really are.<sup>4</sup> "It is every day's experience in land trials, to establish by evidence the identity of both natural and artificial monuments called for in surveys. If the beginning point be at the mouth of a brook or creek, where it empties into a river, evidence may be given, nay, must generally be given, to establish the identity of the brook; and, when once established to the satisfaction of the jury, it has all the effect of any natural or artificial object called for in the survey, and will control courses and distances."<sup>5</sup> The lines and courses in a deed may be established upon the land by showing the survey actually made at the instance of the parties to the deed with a view to its execution.<sup>6</sup>

When the description is by a survey, however full and precise it may be, resort must be had to extrinsic evidence to identify it on the ground. If by such evidence the land described can be found and identified with reasonable certainty, the description is sufficient.<sup>7</sup>

Where the boundaries are may be proved by any kind of evidence which is admissible to prove any fact. As evidence which may tend to establish this fact, the jury may consider, among other things, actual occupation, ancient reputation, the admission of a party against his interest, and the agreement of the parties

<sup>1</sup> *Borer v. Lange*, 44 Minn. 281, 46 N. W. Rep. 358; *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. Rep. 147; *Hooten v. Comerford*, 152 Mass. 591, 26 N. E. Rep. 407.

<sup>2</sup> *Pickett v. Nelson*, 79 Wis. 9, 47 N. W. Rep. 436.

<sup>3</sup> *Hartung v. Witte*, 59 Wis. 285, 18 N. W. Rep. 175.

<sup>4</sup> *Stone v. Clark*, 1 Met. 378, 35 Am. Dec. 370; *Tyler v. Fickett*, 73 Me. 410;

*Wing v. Burgis*, 13 Me. 111; *Walsh v. Hill*, 38 Cal. 481; *Wills v. Leverich*, 20 Oreg. 168, 25 Pac. Rep. 398.

<sup>5</sup> *Ayers v. Watson*, 113 U. S. 594, 605, 5 S. Ct. Rep. 641, per Bradley, J.

<sup>6</sup> *Euliss v. McAdams*, 108 N. C. 507, 13 S. E. Rep. 162; *Roberts v. Preston*, 100 N. C. 243, 6 S. E. Rep. 574; *Kronenberg v. Hoffner*, 44 Mo. 185.

<sup>7</sup> *Douthit v. Robinson*, 55 Tex. 69.



as to the actual location of the boundary.<sup>1</sup> Reference may also be had to prior deeds conveying the same land.<sup>2</sup>

341. What are boundaries is a question of law for the court, but where the boundaries are upon the ground is a question of fact to be determined by the evidence.<sup>3</sup> It is for the jury to fit the boundaries described to the land. Where the terms used in the description of a deed are unambiguous, its interpretation is for the court; but where the terms themselves are ambiguous, or their presumptive meaning is rebutted by competent proof *aliunde*, the question of the meaning of the deed is for the jury.<sup>4</sup>

Where a government corner between adjoining landowners has been obliterated, the exact location of the corner may be determined by the jury from the evidence.<sup>5</sup>

Where the monuments called for by a survey have disappeared, but there is evidence of their existence and location at a former time, it is a question for the jury whether the line was indicated by monuments.<sup>6</sup>

Where the true location of a government corner is in doubt, evidence is admissible to show where the original marks of such corner were years before, when they were very plain and distinct, and were generally regarded and recognized as indicating the original government corner; and to that end it may be shown that permanent improvements, as lines of trees, roads, buildings public and private, were, when such indications were plain and visible, located with reference thereto as the true government corner, by persons who had no other interest than to locate them correctly.<sup>7</sup>

<sup>1</sup> Jones v. Pashby, 62 Mich. 614, 29 N. W. Rep. 374; Mulford v. Le Franc, 26 Cal. 88.

<sup>2</sup> Beaumont v. Field, 1 B. & Ald. 247; McAfee v. Arline, 83 Ga. 645, 10 S. E. Rep. 441; Daily v. Litchfield, 10 Mich. 29; Cronin v. Gore, 38 Mich. 381; Fahey v. Marsh, 40 Mich. 236; Weeks v. Martin, 10 N. Y. Supp. 656; Cannon v. Emmons, 44 Minn. 294, 46 N. W. Rep. 356.

<sup>3</sup> Lyle v. Richards, L. R. H. L. 222; Scull v. Pruden, 92 N. C. 168; Abbott v. Abbott, 51 Me. 575, 581; Farley v. Deslonde, 58 Tex. 588; Scott v. Yard, 46 N. J. Eq. 79, 18 Atl. Rep. 359; Bonaparte v.

Carter, 106 N. C. 534, 11 S. E. Rep. 262; Jones v. Bunker, 83 N. C. 324; Marshall v. Fisher, 1 Jones, 111; Andreu v. Watkins, 26 Fla. 390, 7 So. Rep. 876.

<sup>4</sup> Meeks v. Willard (N. J. L.), 29 Atl. Rep. 318.

<sup>5</sup> McKey v. Hyde Park, 134 U. S. 84, 10 Sup. Ct. Rep. 512; Kittell v. Jensen, 37 Neb. 685, 56 N. W. Rep. 487; Bushey v. South Mountain M. & I. Co. 136 Pa. St. 541, 20 Atl. Rep. 549.

<sup>6</sup> Seneca Nation v. Hugaboom, 9 N. Y. Supp. 699, affirmed 132 N. Y. 492, 30 N. E. Rep. 983.

<sup>7</sup> Arneson v. Spawn (S. D.), 49 N. W.

**342. The office of extrinsic evidence as applied to the description of a parcel** is to explain a latent ambiguity, or to point out the property described on the ground. Such evidence must not contradict the deed, or make a description of other land than that described in the deed.<sup>1</sup> It cannot be used to make the deed convey land not embraced in the words used to describe the subject-matter of the deed, but only to ascertain the intention of the parties as expressed by such words.<sup>2</sup> The test of the admissibility of such evidence is involved in the inquiry whether it tends to explain some descriptive word or expression of doubtful import contained in the deed, so that the description, aided by such explanation, identifies the land conveyed.<sup>3</sup>

**343. There must be something in the deed to suggest the possibility of locating the land** by the use of competent explanatory evidence,<sup>4</sup> and there are cases which seem to go to the extreme limit in this direction. Thus a reference to the land as being "the interest in two shares, adjoining the lands" of persons named, belonging to the vendor, was held sufficient to support explanatory evidence that there was a tract of land which fitted the rest of the description, in which it was known that the vendor claimed two shares; and, moreover, that the land had been more particularly described in a partition proceeding.<sup>5</sup>

Evidence *aliunde* is pointed to by a reference to another deed for the description, or some part of the description;<sup>6</sup> or by a description of the land as being the same inherited by the grantor from his father, or devised to him by some other person; or as

Rep. 1066; *Baker v. McArthur*, 54 Mich. 139, 19 N. W. Rep. 923; *Coy v. Miller*, 31 Neb. 348, 47 N. W. Rep. 1046; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Major v. Watson*, 73 Mo. 661; *Liberty v. Burns*, 114 Mo. 426, 19 S. W. Rep. 1107.

<sup>1</sup> *Hannon v. Hilliard*, 101 Ind. 310; *Jennings v. Brizendine*, 44 Mo. 332; *Fratt v. Woodward*, 32 Cal. 219, 91 Am. Dec. 573; *Fisher v. Quackenbush*, 83 Ill. 310.

<sup>2</sup> *Coleman v. Manhattan Beach Co.* 94 N. Y. 229.

<sup>3</sup> *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. Rep. 891; *Massey v. Belisle*, 2 Ired. 170; *McCormick v. Monroe*, 1 Jones, 13,

16; *Reamer v. Nesmith*, 34 Cal. 624; *Minor v. Powers* (Tex.), 24 S. W. Rep. 710; *Kingston v. Pickins*, 46 Tex. 99.

<sup>4</sup> *Farmer v. Batts*, 83 N. C. 387; *Deaver v. Jones* (N. C.), 19 S. E. Rep. 637; *Kea v. Robeson*, 5 Ired. Eq. 373; *Masterson v. Todd*, 6 Tex. Civ. App. 131, 24 S. W. Rep. 682.

<sup>5</sup> *Farmer v. Batts*, 83 N. C. 387. For other extrinsic cases, see *Edwards v. Bowden*, 99 N. C. 80; *McGlawhorn v. Worthington*, 98 N. C. 199.

<sup>6</sup> *Wharton v. Eborn*, 88 N. C. 344; *Cleveland v. Sims*, 69 Tex. 153, 6 S. W. Rep. 634; *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. Rep. 309.

having formerly been in the possession of a person named;<sup>1</sup> or as called by a distinct name, or described as known by that name.<sup>2</sup>

344. There must be a sufficient description in the deed to afford a basis for admitting parol evidence to identify the land. A description cannot be made by parol evidence.<sup>3</sup> Thus a description of land as consisting of fifty acres situate on the headwaters of a creek named cannot be aided by parol, because there is nothing in the deed by which the location on the creek can be determined.<sup>4</sup> For the same reason, a deed of a hundred and fifty acres of land "lying on Watery Branch," in a county named, is void.<sup>5</sup>

A description of land as "all my interest in a piece of land adjoining the lands of A and B and others," is too vague to admit of extrinsic evidence to fit the description to the land.<sup>6</sup> Whether such a description is too vague to admit of extrinsic evidence, when aided by a reference to the number of acres in the parcel, seems a little uncertain.<sup>7</sup>

345. The particular terms used to describe the property may be defined by parol evidence. The term "messuage" properly includes a dwelling-house and the land usually held with it. Therefore, where land is described as a "messuage" in the occupation of a person named, oral evidence is admissible to show that a garden adjoining had always been occupied with the messuage and passed by the deed.<sup>8</sup>

A "farm" may be defined by parol evidence showing what lands, house, and buildings have been used and known as constituting the farm.

346. Land described as "my residence," "my homestead," "my place," "my lot," may be identified by parol evidence if necessary.<sup>9</sup> Land is sufficiently described as situated in a county

<sup>1</sup> *Brown v. Coble*, 76 N. C. 391.

<sup>2</sup> *Case v. Dexter*, 106 N. Y. 548.

<sup>3</sup> *Dickens v. Barnes*, 79 N. C. 490; *Walker v. Moses*, 113 N. C. 527, 18 S. E. Rep. 339; *Farmer v. Batts*, 83 N. C. 387; *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. Rep. 891; *Bowers v. Andrews*, 52 Miss. 596. See § 323.

<sup>4</sup> *Radford v. Edwards*, 88 N. C. 347.

<sup>5</sup> *Capps v. Holt*, 5 Jones Eq. 153. See, also, *Hinchey v. Nichols*, 72 N. C. 66.

<sup>6</sup> *Harrell v. Butler*, 92 N. C. 20.

<sup>7</sup> *Dickens v. Barnes*, 79 N. C. 490; *Farmer v. Batts*, 83 N. C. 387. The decisions in these cases do not seem to be quite in harmony.

<sup>8</sup> *Doe v. Webster*, 12 A. & E. 442.

<sup>9</sup> *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. Rep. 979; *Andrews v. Pearson*, 68 Me. 19; *Eulias v. McAdams*, 108 N. C. 507, 13 S. E. Rep. 162; *Carson v. Ray*, 7 Jones, 609; *Murdock v. Anderson*, 4 Jones Eq. 77; *Lente v. Clark*, 22 Fla. 515, 1 So. Rep. 149; *Lick v. O'Donnell*,

named, containing a certain number of acres, and being the land on which I now reside.<sup>1</sup> Or all my land in a certain town, county, or State;<sup>2</sup> or all my lands wherever situated.<sup>3</sup> If the land be described as the land inherited by the grantor from his parents or others named, evidence to identify the land so inherited is admissible.<sup>4</sup> Parol evidence is admissible to identify land described by a name applied by the parties to the property, though not so known by the entire neighborhood.<sup>5</sup>

**347. If the property be described as a house and lot in a street named,** evidence is admissible that the vendor or grantor had only one house and lot on that street, and that the parties had been in treaty for the purchase and sale of such house and lot. Such evidence identifies the property, and applies the description to the property intended.<sup>6</sup> "In a deed the words of description are, of course, intended to relate to an estate owned by the grantor. And, in our opinion, this is also the presumption in construing a contract for a future conveyance. If the party who enters into the agreement in fact owns a parcel answering to the description, and only one such, that must be regarded as the one to which the description refers. With the aid of this presumption, the words 'a house and lot,' on a street where the party who uses the language owns only one estate, are as definite and precise as the words 'my house and lot' would be, — a description the sufficiency of which has been placed beyond all doubt by very numerous authorities."<sup>7</sup>

A description of a town lot by its length and breadth, and also by the improvements upon it, is sufficient when it is shown that no other lot in the town has improvements of a like character.<sup>8</sup>

<sup>3</sup> Cal. 59, 58 Am. Dec. 383; *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 441; *Tetherow v. Anderson*, 63 Mo. 96; *Jackson v. DeLancey*, 4 Cow. 427, 11 Johns. 365, 13 Johns. 537; *Pond v. Bergh*, 10 Paige, 140, 156; *Campbell v. Morgan*, 68 Hun, 490, 22 N. Y. Supp. 1001.

<sup>1</sup> *Swiney v. Swiney*, 14 Lea, 316.

<sup>2</sup> *Frey v. Clifford*, 44 Cal. 335; *Brown v. Warren*, 16 Nev. 228; *Starling v. Blair*, 4 Bibb, 289; *Blair v. Burns*, 8 Colo. 397, 8 Pac. Rep. 569.

<sup>8</sup> *Pettigrew v. Dobbelaar*, 63 Cal. 396.

<sup>4</sup> *Smith v. Westall*, 76 Tex. 509, 13 S. W. Rep. 540.

<sup>5</sup> *Dougherty v. Chesnutt*, 86 Tenn. 1, 5 S. W. Rep. 444; *Euliss v. McAdams*, 108 N. C. 507, 13 S. E. Rep. 162; *Henley v. Wilson*, 81 N. C. 405; *Smith v. Low*, 2 Ired. 457.

<sup>6</sup> *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Mead v. Parker*, 115 Mass. 413, 20 Am. Rep. 110.

<sup>7</sup> *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 441; *Hurley v. Brown*, 98 Mass. 545, 547, 96 Am. Dec. 671, per Foster, J.

<sup>8</sup> *Harkey v. Cain*, 69 Tex. 146, 6 S. W. Rep. 637.

**348.** A conveyance in general terms of all the lands of the grantor wherever situated, without further description, may be rendered certain as to the lands conveyed by proving what lands the grantor owned at the time such conveyance was executed.<sup>1</sup> By a conveyance of all the grantor's real estate without description, only that of which he holds the legal title passes.<sup>2</sup>

**349.** A parcel of land described as adjoining the lands of persons named, and as containing a specified number of acres, is sufficiently described to admit parol evidence as to the land intended to be conveyed.<sup>3</sup> If the quantity of land be given, and it be described as situate in a certain county adjoining the lands of three persons named, the question left open for explanation by proof *aliunde* is whether the grantor had a tract of land in the county containing the quantity named, and so bounded by the lands of the three persons named as to separate it from other tracts, and to indicate its boundaries with reasonable certainty.<sup>4</sup>

**350.** A deed conveying all of a designated tract of land not included in a previous conveyance by the grantor to a third person is insufficient of itself to show title to any of such lands in the grantee, though the deed may be made effectual by showing what part of the tract had not been conveyed to such third person.<sup>5</sup> The deed will convey title to such land as the grantor actually owns within the limits of the whole tract described.<sup>6</sup> If land be described as a part of a larger tract, and as being the remainder of such tract not already sold by the grantor, there is sufficient data for determining the land intended to be conveyed.<sup>7</sup>

**351.** A description of a tract of land by name only points to evidence *aliunde* showing the existence of a body of land generally known by the name designated, and such evidence is admissible to apply the name to the land intended.<sup>8</sup> A grant of the

<sup>1</sup> Clifton Heights Land Co. v. Randell, 82 Iowa, 89, 47 N. W. Rep. 905; Harvey v. Edens, 69 Tex. 420, 6 S. W. Rep. 306; Falls Land, &c. Co. v. Chisholm, 71 Tex. 523, 9 S. W. Rep. 479; Witt v. Harlan, 66 Tex. 660, 2 S. W. Rep. 41; Smith v. Westall, 76 Tex. 509, 13 S. W. Rep. 540.

<sup>2</sup> Jamaica Pond Aqueduct Co. v. Chandler, 9 Allen, 159, 169, per Bigelow, J.

<sup>3</sup> Perry v. Scott, 109 N. C. 374, 14 S.

E. Rep. 294; McGlawhorn v. Worthington, 98 N. C. 199, 3 S. E. Rep. 633; Edwards v. Bowden, 99 N. C. 80, 5 S. E. Rep. 283.

<sup>4</sup> Blow v. Vaughan, 105 N. C. 198, 10 S. E. Rep. 891.

<sup>5</sup> Maier v. Joslin, 46 Minn. 228, 48 N. W. Rep. 909.

<sup>6</sup> Baker v. Clay, 101 Mo. 553, 14 S. W. Rep. 734.

<sup>7</sup> Duncan v. Madara, 106 Pa. St. 562.

<sup>8</sup> Andrews v. Pearson, 68 Me. 19; Eu-

land by such name passes the title to the entire tract known by that name.<sup>1</sup> Where a mortgage conveyed "the following described tract or parcel of land, to wit, the property known as 'K's Grist and Saw Mill and Gin,' together with all the privileges and appurtenances belonging thereto," parol evidence was admitted to show that two acres of land on which the mill and gin were situated had always been used in connection therewith, and were necessary to the enjoyment of the same.<sup>2</sup>

**352. A deed should be construed with reference to the actual state of the land at the time of its execution.** The court should as nearly as possible assume the position of the parties to the deed, and consider the circumstances of the transaction between them, and then read and interpret the words used in the light of these circumstances.<sup>3</sup> A deed will not be held void for uncertainty so long as by reasonable intendment it can be ascertained what both parties understood to be embraced in the description. "Descriptions do not identify of themselves; they only furnish the means of identification. They give us certain marks or characteristics, — perhaps historical data or incidents, — by the aid of which we may single out the thing intended from all others; not by the description alone, but by that explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the

*lias v. McAdams*, 108 N. C. 507, 13 S. E. Rep. 162; *Henley v. Wilson*, 81 N. C. 405; *Smith v. Low*, 2 Ired. 457; *Scull v. Pruden*, 92 N. C. 168; *McGlawhorn v. Worthington*, 98 N. C. 199, 3 S. E. Rep. 633; *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 441; *Coleman v. Manhattan Bank Co.* 94 N. Y. 229; *Marvin v. Elliot*, 99 Mo. 616, 12 S. W. Rep. 899; *Trentman v. Neff*, 124 Ind. 503, 24 N. E. Rep. 895.

<sup>1</sup> *Truett v. Adams*, 66 Cal. 218; *Haley v. Amestoy*, 44 Cal. 132; *Stanley v. Green*, 12 Cal. 148; *Huddleson v. Reynolds*, 8 Gill, 332.

<sup>2</sup> *Kimbrell v. Rogers*, 90 Ala. 339, 7 So. Rep. 241. "While, ordinarily, land cannot be said to pass as appurtenant to land, if the land expressly granted does not admit of reasonable enjoyment with-

out certain adjacent land, which has been constantly used with the land granted, it will also pass." *Woodman v. Smith*, 53 Me. 79; *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388; *Voorhees v. Burchard*, 55 N. Y. 98; *Esty v. Carrier*, 98 Mass. 500; *Allen v. Scott*, 21 Pick. 25, 32 Am. Dec. 238.

<sup>3</sup> *Jones v. Pashby*, 62 Mich. 614, 29 N. W. Rep. 374; *Thompson v. Motor Road Co.* 82 Cal. 497, 23 Pac. Rep. 130; *Truett v. Adams*, 66 Cal. 218, 5 Pac. Rep. 96; *Thompson v. So. Cal. M. R. Co.* 82 Cal. 497, 23 Pac. Rep. 130; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. Rep. 6; *Whitney v. Robinson*, 53 Wis. 309, 10 N. W. Rep. 512; *Cilley v. Childs*, 73 Me. 130; *Elliott v. Gilchrist*, 64 N. H. 260, 9 Atl. Rep. 382; *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. Rep. 551.

description has been prepared, and read it with the knowledge of the subject-matter which they had at the time.”<sup>1</sup>

A bond or agreement to convey may assist in explaining an ambiguity in the deed made in pursuance of such bond or agreement; for, though the negotiations of the parties which led to the making of the deed are merged in the deed and cannot be allowed to control the deed, they may serve to explain any ambiguity in it, or to point out what is erroneous.<sup>2</sup>

**353. A grant will be held void for uncertainty when, after resort to oral proof, the parcel is still uncertain, and it remains a matter of mere conjecture what was intended by the instrument.<sup>3</sup> If the description is not sufficient, with the aid of extrinsic testimony, to identify the land and all its boundaries, the deed will not pass any title to the grantee.<sup>4</sup>**

A deed describing land merely as lying on Flat River, including a house and lot named, adjoining the lands of persons named, is void for uncertainty, because no quantity of land is given, nor any means pointed out by which the land about the house and lot named could be laid off.<sup>5</sup>

### III. *Boundary Lines by Agreement.*

**354. An oral agreement fixing a dividing line between adjoining owners is not within the statute of frauds, if such line had been in doubt or dispute; and the agreement may be enforced in equity, and at law as well.<sup>6</sup> Such agreement is not**

<sup>1</sup> Willey v. Snyder, 34 Mich. 60. And see Hoffman v. Port Huron (Mich.), 60 N. W. Rep. 831.

<sup>2</sup> Moran v. Lezotte, 54 Mich. 83, 19 N. W. Rep. 757.

<sup>3</sup> Mason v. Merrill, 129 Ill. 503, 21 N. E. Rep. 799; Bernstein v. Humes, 71 Ala. 260; Townsend v. Downer, 23 Vt. 225; Bates v. Bank of Missouri, 15 Mo. 309, 55 Am. Dec. 145; Le Franc v. Richmond, 5 Sawyer, 601.

<sup>4</sup> Blow v. Vaughan, 105 N. C. 198, 10 S. E. Rep. 891; McCormick v. Monroe, 1 Jones, 13, 16.

<sup>5</sup> Allen v. Chambers, 4 Ired. Eq. 125. For other descriptions held void for indefiniteness, see Harrell v. Butler, 92 N. C. 20; Hinchey v. Nichols, 72 N. C. 66;

Blow v. Vaughan, 105 N. C. 198, 10 S. E. Rep. 891. See §§ 323, 344.

<sup>6</sup> California: White v. Spreckels, 75 Cal. 610, 17 Pac. Rep. 715. Illinois: Sheets v. Sweeney, 136 Ill. 336, 26 N. E. Rep. 648; Cutler v. Callison, 72 Ill. 113; Kerr v. Hitt, 75 Ill. 51; McNamara v. Seaton, 82 Ill. 498; People v. Stahl, 101 Ill. 346; Fisher v. Bennehoff, 121 Ill. 426, 13 N. E. Rep. 150; Schoonmaker v. Doolittle, 118 Ill. 605, 8 N. E. Rep. 839. Kentucky: Jamison v. Petit, 6 Bush, 669; Grigsby v. Combs (Ky.), 21 S. W. Rep. 37; Ferguson v. Crick (Ky.), 23 S. W. Rep. 668. Massachusetts: Boston & W. R. Co. v. Sparhawk, 5 Met. 469; Wakefield v. Ross, 5 Mason, 16. Mississippi: Archer v. Helm, 69 Miss. 730, 11 So. Rep.

regarded as passing the title to any real estate, but merely as defining the line between such owners,<sup>1</sup> "because that can only be done by deed properly executed; but such settlement determines the location of the existing estate of each, and, when followed by possession and occupancy, binds them, not by way of passing title, but as determining the true location of the boundary line between their lands."<sup>2</sup>

**355.** If the divisional line is well defined and known to the parties, a parol agreement fixing upon a new and different line is not binding, because it would amount to a parol conveyance of land, contrary to the statute of frauds.<sup>3</sup> Such agreement

<sup>3</sup>; *Natchez v. Vandervelde*, 31 Miss. 706, 66 Am. Dec. 581. **Missouri**: *Krider v. Milner*, 99 Mo. 145, 12 S. W. Rep. 461, 17 Am. St. Rep. 549; *Atchison v. Pease*, 96 Mo. 566; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. Rep. 549; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Acton v. Dooley*, 74 Mo. 63; *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226; *Blair v. Smith*, 16 Mo. 273; *Taylor v. Zepp*, 14 Mo. 482; *Smith v. McCorkle*, 105 Mo. 135, 16 S. W. Rep. 602. **New York**: *Vosburgh v. Teator*, 32 N. Y. 561; *Davis v. Townsend*, 10 Barb. 333.

<sup>1</sup> *Boyd v. Graves*, 4 Wheat. 513. **Delaware**: *Lindsay v. Springer*, 4 Harr. (Del.) 547, 550. **Florida**: *Watrous v. Morrison*, 33 Fla. 261, 14 So. Rep. 805. **Illinois**: *Berghoefer v. Frazier* (Ill.), 37 N. E. Rep. 914; *Crowell v. Maughs*, 7 Ill. 419; *Yates v. Shaw*, 24 Ill. 367. **Michigan**: *Smith v. Hamilton*, 20 Mich. 433, 438, 4 Am. Rep. 398; *Burns v. Martin*, 45 Mich. 22, 24, 7 N. W. Rep. 219. **Missouri**: *Blair v. Smith*, 16 Mo. 273, 281; *Turner v. Baker*, 64 Mo. 218, 239, 240, 27 Am. Rep. 226; *Acton v. Dooley*, 74 Mo. 63. **New York**: *Terry v. Chandler*, 16 N. Y. 354, 356, 69 Am. Dec. 707; *Jackson v. Pierce*, 2 Johns. 221; *Kip v. Norton*, 12 Wend. 127; *Vosburgh v. Teator*, 32 N. Y. 561; *Wood v. Lafayette*, 46 N. Y. 484, 68 N. Y. 181; *Stout v. Woodward*, 5 Hun. 340, affirmed 71 N. Y. 590; *Sherman v. Kane*, 86 N. Y. 57. **Pennsylvania**: *Hagey v. Detweiler*, 35 Pa. St. 409, 412. **Rhode Island**: *O'Donnell v. Penney*, 17 R. I. 164, 20 Atl. Rep.

305. **West Virginia**: *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. Rep. 880.

<sup>2</sup> *Berghoefer v. Frazier*, 150 Ill. 577, 37 N. E. Rep. 914.

<sup>3</sup> *Schraeder Min. Co. v. Packer*, 129 U. S. 688. **Alabama**: *Alexander v. Wheeler*, 69 Ala. 332. **Florida**: *Watrous v. Morrison*, 33 Fla. 261, 14 So. Rep. 805. **Massachusetts**: *Boston & W. R. Co. v. Sparhawk*, 5 Met. 469. **Michigan**: *White v. Hapeman*, 43 Mich. 267, 5 N. W. Rep. 313, 38 Am. Rep. 178; *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533. **Nebraska**: *Trussel v. Lewis*, 13 Neb. 415, 42 Am. Rep. 767. **New Hampshire**: *Bartlett v. Young*, 63 N. H. 265; *Dudley v. Elkins*, 39 N. H. 78; *Sawyer v. Fellows*, 6 N. H. 107, 25 Am. Dec. 452. **New York**: *Vosburgh v. Teator*, 32 N. Y. 561; *Terry v. Chandler*, 16 N. Y. 354, 69 Am. Dec. 707; *Ambler v. Cox*, 13 Hun. 295; *Sanford v. McDonald*, 53 Hun. 263, 6 N. Y. Supp. 613. **North Carolina**: *Buckner v. Anderson*, 111 N. C. 572, 16 S. E. Rep. 424; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. Rep. 1033; *Caraway v. Chancy*, 6 Jones, 361. **Ohio**: *Bobo v. Richmond*, 25 Ohio St. 115. **Pennsylvania**: *Fleming v. Ramsay*, 46 Pa. St. 252. **Texas**: *George v. Thomas*, 16 Tex. 74, 89, 67 Am. Dec. 612; *Coleman v. Smith*, 55 Tex. 254; *Browning v. Atkinson*, 46 Tex. 605, 609; *Dement v. Williams*, 44 Tex. 158. *Coughran v. Alderete* (Tex. Civ. App.), 26 S. W. Rep. 109. **Wisconsin**: *Pickett v. Nelson*, 71 Wis. 542, 37 N. W. Rep. 836; *Hartung v. Witte*, 59 Wis. 285.



is binding only in case the boundary line has been the subject of dispute and contention, and the parties, with the view to settle the dispute, agree upon and settle a line between their lands;<sup>1</sup> though a line may be established by acquiescence, for a period equal to that fixed by the statute of limitations, where there is no dispute about it.<sup>2</sup>

356. There is a marked distinction between an undertaking to settle a disputed boundary and the mere consent of the parties to adopt a dividing line, in regard to which no doubt or dispute has arisen, and in regard to which both are mistaken as to the true line. The acquiescence or admission of the owner of land, made under a mistake as to his rights, should neither estop nor prejudice him from subsequently enlarging his possession to the limits of his true title, provided no actual adversary possession has intervened to defeat his title. This has long been the settled rule. Thus, in an early case in Pennsylvania, Mr. Justice Gibson said: "If the parties, from misapprehension, adjust their fences, and exercise acts of ownership, in conformity with a line which turns out not to be the true boundary, or permission be ignorantly given to place a fence on the land of the party, this will not amount to an agreement, or be binding as an assent of the parties; and I agree it is a principle of equity that the parties to an agreement must be acquainted with the extent of their rights, and the nature of the information they can call for respecting them, else they will not be bound. The reason is, that they proceed under an idea that the fact which is the inducement to the agreement is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event."<sup>3</sup> Mr. Justice Lamar, in a case before the Supreme Court of the United States, after quoting from and approving this Pennsylvania case, said: "The decisions in the other States generally support the rule that owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a

<sup>1</sup> *Adams v. Rockwell*, 16 Wend. 285; *Patten v. Stitt*, 6 Robt. 431; *Vosburgh v. Teator*, 32 N. Y. 561; *Hass v. Plautz*, 56 Wis. 105, 14 N. W. Rep. 65, 43 Am. Rep. 699; *Miller v. McGlaun*, 63 Ga. 435; *Beardsley v. Crane*, 52 Minn. 537, 54 N. W. Rep. 740; *Pickett v. Nelson*, 79 Wis. 9, 47 N. W. Rep. 936.

<sup>2</sup> *Helm v. Wilson*, 76 Cal. 476, 18 Pac. Rep. 604.

<sup>3</sup> *Perkins v. Gay*, 3 S. & R. 327, 331, 8 Am. Dec. 653, citing *Turner v. Turner*, 2 Rep. Ch. 81; *Bingham v. Bingham*, 1 Ves. Sr. 126; *Gee v. Spencer*, 1 Vern. 32; *Pusey v. Desbouvrie*, 3 P. Wms. 316.

mistaken apprehension that it is the true line, each claiming only the true line, wherever it may be found, and that in such case neither party is precluded or estopped from claiming his own rights under the true one when it is discovered.”<sup>1</sup>

**357.** Whether there is a dispute or uncertainty in regard to the boundary line is a matter sometimes requiring consideration. That there is a question between adjoining owners in regard to the boundary line is not enough to serve as the foundation of a valid and conclusive agreement as to such line. Thus, where a question arose as to the boundary line, and one of the parties caused a survey to be made, and both parties expressed themselves as satisfied with the line of such survey, and a partition wall was placed upon such line, it was found as a fact that the line was not drawn and fixed as a compromise of any dispute between the parties, and that the true line was susceptible of demonstration by a survey correctly made. The agreed line was not therefore binding upon either party. The only effect of the agreement was, that the parties were to accept and abide by the line established by the survey if it was the true line, and not otherwise. When it was shown that this was not the true line, either party was at liberty to repudiate the erroneous line.<sup>2</sup>

There need be no actual dispute between the parties as a basis for an agreed line, if the true boundary lines are in fact uncertain, and can be determined only by judicial inquiry.<sup>3</sup>

**358.** If the parties have carried the agreement into execution, and entered into possession in accordance with it, the courts will not disturb it, though both parties were mistaken as to the true location of the line.<sup>4</sup> “Having agreed upon the

<sup>1</sup> *Schraeder Min. Co. v. Packer*, 129 U. S. 688, 9 Sup. Ct. Rep. 385. And see *Jenkins v. Trager*, 40 Fed. Rep. 726; *White v. Ward*, 35 W. Va. 418, 14 S. E. Rep. 22; *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E. Rep. 153; *Smith v. Davis*, 4 Gratt. 50; *Hubbell v. McCulloch*, 47 Barb. 287; *Buchanan v. Ashdown*, 71 Hun, 327, 24 N. Y. Supp. 1122; *Hass v. Plautz*, 56 Wis. 105, 14 N. W. Rep. 65, 43 Am. Rep. 639; *Harn v. Smith*, 79 Tex. 310, 15 S. W. Rep. 240, 23 Am. St. Rep. 340; *Coleman v. Smith*, 55 Tex. 254; *Browning v. Atkinson*, 46 Tex. 605; *George v. Thomas*, 16 Tex. 74, 89, 67 Am. Dec. 612.

<sup>2</sup> *Sanford v. McDonald*, 53 Hun, 263. And see *Hubbell v. McCulloch*, 47 Barb. 287.

<sup>3</sup> *Silvarer v. Hansen*, 77 Cal. 79, 20 Pac. Rep. 136.

<sup>4</sup> *California*: *Cavanaugh v. Jackson*, 91 Cal. 580, 27 Pac. Rep. 931; *Silvarer v. Hansen*, 77 Cal. 579, 20 Pac. Rep. 136; *White v. Spreckels*, 75 Cal. 610, 17 Pac. Rep. 715; *Helm v. Wilson*, 76 Cal. 476, 18 Pac. Rep. 604; *Sneed v. Osborn*, 25

line, or agreed upon a mode by which it shall be determined, and having accepted and acquiesced in it by the unequivocal act of taking possession according to the line, they and their privies are estopped from afterwards disputing it. The estoppel arises from the act of the parties in taking possession, and occupying their respective tracts to the line thus agreed upon and determined."<sup>1</sup> The courts, on the contrary, encourage such settlements as a means of suppressing litigation.<sup>2</sup> To make the agreement effective, however, by way of estoppel, it is necessary that the line established by agreement should be followed by possession according to that line.<sup>3</sup>

Parol evidence is admissible to show the location of a boundary line established by agreement between the adjoining land-owners.<sup>4</sup>

In case one of the parties at once repudiated the line as fixed, and retained possession of the land in controversy, and there has been no possession acquired or taken by the other according to the line claimed to have been established by the agreement of

Cal. 619, 626. **Delaware**: *Lindsay v. Springer*, 4 Harr. 547, 549, 550. **Idaho**: *Idaho Land Co. v. Parsons*, 2 Ida. 1191, 31 Pac. Rep. 791. **Illinois**: *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. Rep. 750; *Quick v. Nitschelm*, 139 Ill. 251, 28 N. E. Rep. 926; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150; *Bloomington v. Cemetery*, 126 Ill. 221, 18 N. E. Rep. 298; *Crowell v. Maugh's*, 7 Ill. 419. **Indiana**: *Main v. Killinger*, 90 Ind. 165; *Kinsey v. Satterthwaite*, 88 Ind. 342. **Kentucky**: *Young v. Woollett* (Ky.), 29 S. W. Rep. 879. **Maine**: *Pritchard v. Young*, 74 Me. 419. **Massachusetts**: *Kellogg v. Smith*, 7 Cush. 375, 379. **New Hampshire**: *Sawyer v. Fellows*, 6 N. H. 107, 25 Am. Dec. 452; *Eaton v. Rice*, 8 N. H. 378; *Gray v. Berry*, 9 N. H. 473; *Prescott v. Hawkins*, 12 N. H. 19; *Orr v. Hadley*, 36 N. H. 575; *Dudley v. Elkins*, 39 N. H. 78; *Bartlett v. Young*, 63 N. H. 265. **New York**: *Jackson v. Dysling*, 2 Caines, 198, 201; *Jackson v. Ogden*, 7 Johns. 238, 245; *Kip v. Norton*, 12 Wend. 127, 130, 27 Am. Dec. 120; *Laverty v. Moore*, 32 Barb. 347. **Ohio**: *Hills v. Ludwig*, 46 Ohio St. 373, 24 N. E. Rep. 596. **Penn-**

**sylvania**: *Perkins v. Gay*, 3 Serg. & R. 327, 331, 7 Am. Dec. 653. **Texas**: *Levy v. Maddux*, 81 Tex. 210, 16 S. W. Rep. 877; *Eddie v. Tinnin* (Tex. Civ. App.), 26 S. W. Rep. 732; *Harn v. Smith*, 79 Tex. 310, 15 S. W. Rep. 240; *Harrell v. Houston*, 66 Tex. 278; *Coleman v. Smith*, 55 Tex. 254; *Houston v. Sneed*, 15 Tex. 307. **West Virginia**: *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. Rep. 880, 885; *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. Rep. 400.

<sup>1</sup> *Berghoefer v. Frazier*, 150 Ill. 577, 37 N. E. Rep. 914.

<sup>2</sup> *McArthur v. Henry*, 35 Tex. 801; *Houston v. Matthews*, 1 Yerg. 116; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150.

<sup>3</sup> *Berghoefer v. Frazier*, 150 Ill. 577, 37 N. E. Rep. 914; *Yates v. Shaw*, 24 Ill. 367; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Kerr v. Hitt*, 75 Ill. 51; *Cutler v. Callison*, 72 Ill. 113; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150; *Bloomington v. Cemetery*, 126 Ill. 221, 18 N. E. Rep. 298.

<sup>4</sup> *Sheetz v. Sweeney*, 136 Ill. 336, 26 N. E. Rep. 648.

the parties, it is clear that there has been no practical location of the line by which the parties are estopped.<sup>1</sup>

**359. An agreement settling a disputed boundary is a finality, and cannot be disturbed, though the parties afterwards learn that the true line could have been found, or the parties were mistaken as to the true line.<sup>2</sup> After a disputed boundary has been established by agreement, a subsequent conveyance by the parties to the agreement and their privies, by the same description as that under which the title was acquired and possession held prior to the agreement, will pass the title according to the agreed boundary.<sup>3</sup> If the agreed line is marked by monuments, subsequent purchasers would be bound to take notice of them for this reason;<sup>4</sup> but if the agreement is susceptible of clear proof, it is**

<sup>1</sup> *Berghoefer v. Frazier*, 150 Ill. 577, 37 N. E. Rep. 914.

<sup>2</sup> *California*: *Truett v. Adams*, 66 Cal. 218; *Sneed v. Osborn*, 25 Cal. 619; *Silvarer v. Hansen*, 77 Cal. 579, 20 Pac. Rep. 136; *Cavanaugh v. Jackson*, 91 Cal. 580, 27 Pac. Rep. 931; *White v. Spreckels*, 75 Cal. 610, 17 Pac. Rep. 715. *Idaho*: *Idaho Land Co. v. Parsons*, 2 Ida. 1191, 31 Pac. Rep. 791. *Illinois*: *Yates v. Shaw*, 24 Ill. 367; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150; *Bauer v. Gottmanhausen*, 65 Ill. 499; *McNamara v. Seaton*, 82 Ill. 498; *Cutler v. Callison*, 72 Ill. 113. *Indiana*: *Horton v. Brown*, 130 Ind. 113, 29 N. E. Rep. 414; *Cleveland v. Obenchain*, 107 Ind. 591; *Pitcher v. Dove*, 99 Ind. 175. *Kentucky*: *Grigsby v. Combs (Ky.)*, 21 S. W. Rep. 37. *Maine*: *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616. *Michigan*: *Smith v. Hamilton*, 20 Mich. 438, 4 Am. Rep. 398; *Jones v. Pashby*, 67 Mich. 459, 35 N. W. Rep. 152. *Missouri*: *Major v. Rice*, 57 Mo. 384; *Atchison v. Pease*, 96 Mo. 566, 10 S. W. Rep. 159; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. Rep. 849. *New Hampshire*: *Thompson v. Major*, 58 N. H. 242. The case of *Sawyer v. Fellows*, 6 N. H. 107, is in its terms unlimited in its application to agreements fixing the boundary line between adjacent owners; but it should be limited to cases of disputed or uncertain boundaries. It was doubtless intended to be so limited

because the cases cited by the court in support of the doctrine announced are so limited. See *Bartlett v. Young*, 63 N. H. 265. *New York*: *Vosburgh v. Yeaton*, 32 N. Y. 561; *McCormick v. Barnum*, 10 Wend. 104. *Ohio*: *Avery v. Baum*, Wright, 576; *Walker v. Devlin*, 2 Ohio St. 593; *Bobo v. Richmond*, 25 Ohio St. 115; *Hills v. Ludwig*, 46 Ohio St. 373, 24 N. E. Rep. 596. In this case *Bradley, J.*, said: "This view is entirely consistent with the principle that where adjoining proprietors, in attempting to find the true line between them, by mistake fix upon an incorrect one, they may repudiate the spurious line . . . at any time before the statute of limitation has run." *Texas*: *Cooper v. Austin*, 58 Tex. 494; *Coleman v. Smith*, 55 Tex. 254; *Levy v. Maddux*, 81 Tex. 210, 16 S. W. Rep. 877; *Houston v. Sneed*, 15 Tex. 307; *Harrell v. Houston*, 66 Tex. 278, 17 S. W. Rep. 731; *Linney v. Wood*, 66 Tex. 22, 17 S. W. Rep. 244. *Virginia*: *Voight v. Raby (Va.)*, 20 S. E. Rep. 824. *West Virginia*: *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. Rep. 880.

<sup>3</sup> *Smith v. Catlin Land Co.* 117 Mo. 438, 22 S. W. Rep. 1083; *Smith v. McConkle*, 105 Mo. 135, 16 S. W. Rep. 602; *Sawyer v. Fellows*, 6 N. H. 107, 25 Am. Dec. 452; *Dudley v. Elkins*, 39 N. H. 78.

<sup>4</sup> *Makepeace v. Bancroft*, 12 Mass. 469; *Davis v. Rainsford*, 17 Mass. 207; *Sawyer*

undoubtedly binding upon subsequent purchasers, though there are no visible monuments of the agreed line.<sup>1</sup>

**360.** A division line between adjoining owners established by the award of referees, under a written agreement entered into by them for the purpose, is binding upon them where possession of the land is taken and held by them respectively under the award.<sup>2</sup>

An award on an oral submission as to the division line between adjoining proprietors is not conclusive between them unless followed by an acquiescence for a time sufficient to give title by prescription.<sup>3</sup>

Fence-viewers having no official authority to establish a disputed boundary line, their establishment of one is merely an award on an oral submission, or a parol contract between the parties.<sup>4</sup>

A boundary line fixed by a surveyor employed by various property owners is not binding upon an owner who was not a party to the surveying, and who never acquiesced in the line fixed by the surveyor.<sup>5</sup>

**361.** The parties to an effectual agreement establishing a boundary line must be owners in fee of the lands adjoining upon the disputed or uncertain boundary. "It is absurd to suppose that a parol agreement to establish a boundary, where one of the contracting parties is an owner and the other has neither the title nor the possession, can be of any avail. It is difficult to comprehend how such an agreement could have any operation at all."<sup>6</sup>

But the fact that a purchaser of land has not yet paid the consideration therefor does not invalidate a parol agreement made

*v. Fellows*, 6 N. H. 107, 25 Am. Dec. 452; *Boyd v. Graves*, 4 Wheat. 513.

<sup>1</sup> *Dudley v. Elkins*, 39 N. H. 78.

<sup>2</sup> *Veasey v. Williams*, 6 Houst. 563.

<sup>3</sup> *Smith v. Bullock*, 16 Vt. 592; *Watrous v. Morrison*, 33 Fla. 261, 14 So. Rep. 805.

<sup>4</sup> *Camp v. Camp*, 59 Vt. 667, 10 Atl. Rep. 748.

<sup>5</sup> *Kampmann v. Heintz* (Tex. Civ. App.), 24 S. W. Rep. 329.

<sup>6</sup> *Terry v. Chandler*, 16 N. Y. 354. In this case A, who had been in possession of lands on both sides of a ditch for more

than twenty years, made an oral agreement with B, who claimed title to nine acres on the north side of the ditch, that the ditch should constitute the division line between them; and B thereupon entered into and for five years kept possession of the nine acres. It was held that the agreement did not affect the title, or prevent A from recovering possession. See, also, *Vosburgh v. Teator*, 32 N. Y. 561; *Sneed v. Osborn*, 25 Cal. 619; *Anderson v. Jackson*, 69 Tex. 346, 6 S. W. Rep. 575.

by him with the adjoining owners fixing the boundary line between their lands.<sup>1</sup>

An agreement between a grantor and his grantee's husband fixing the division line between the land conveyed and that retained by the grantor at a line different from the one stated in the deed, in consequence of which the grantor extended improvements up to the new line, is not binding upon the grantee when it and the improvements were made without her knowledge.<sup>2</sup>

The agreement or acquiescence of one heir does not bind the other heirs, all the heirs being tenants in common of the property.<sup>3</sup>

**362.** A mere intruder is not allowed to question the boundaries defined in a deed, and assert the title to a portion of the land to be in an adjoining owner, especially when it appears that the grantee by the deed has had long-continued possession of the land in accordance with the boundaries described in his deed.<sup>4</sup>

**363.** A division line established by the admission of one of the parties, and acted upon by the other, may estop the former from denying that it is the true line though in fact it is not. Thus where one of two adjoining proprietors, for the purpose of enabling the other to locate a division fence, pointed out a line as the true dividing line between them, and the latter, relying upon this information, built the fence and cultivated the land and made improvements up to this line, it was held that, as against him, the other proprietor and his grantees were estopped to claim that a mistake had been made, and the line established was not the true line.<sup>5</sup> And so where a landowner surveys a boundary line for his land, which is publicly marked, and sells land with reference thereto, he is estopped from denying the correctness of its location as against one purchasing with reference thereto.<sup>6</sup>

When parties agree upon a line, neither of them knowing the

<sup>1</sup> *Cavanaugh v. Jackson*, 91 Cal. 580, 27 Pac. Rep. 931.

<sup>2</sup> *Mitchell v. Brawley* (Ind.), 39 N. E. Rep. 497.

<sup>3</sup> *Lagow v. Glover*, 77 Tex. 448, 14 S. W. Rep. 141.

<sup>4</sup> *Stembridge v. Britschur* (Ky.), 20 S. W. Rep. 278; *Fowke v. Darnall*, 5 Litt. (Ky.) 316, 321.

<sup>5</sup> *Lemmon v. Hartsook*, 80 Mo. 13;

*Idaho Land Co. v. Parsons*, 2 Idaho, 1191, 31 Pac. Rep. 791; *Sherman v. Hastings*, 81 Iowa, 372, 46 N. W. Rep. 1084; *Coughran v. Alderete* (Tex. Civ. App.), 26 S. W. Rep. 109.

<sup>6</sup> *New York, &c. Land Co. v. Gardner* (Tex.), 25 S. W. Rep. 737; *Briscoe v. Puckett* (Tex.), 12 S. W. Rep. 978; *Anderson v. Jackson*, 69 Tex. 346, 6 S. W. Rep. 575, 13 S. W. Rep. 30.

true line, but each intending to fix upon it, and each acting on the best information he can get, and not relying wholly upon the other, makes a mistake in locating the line, neither of them is estopped from asserting claim to the true line when this is afterwards ascertained.<sup>1</sup>

The owner of a city lot, upon part of which his neighbor has erected a building, is not estopped from asserting title to such part by the fact that he allowed the building to be erected without objection, where it appears that he honestly believed that his neighbor knew the correct location of the boundary between their lots.<sup>2</sup>

Though one of two adjoining owners has been led to establish, or acquiesce in the establishment of, a line as the true boundary between the estates by the misrepresentation of the other, still the line is binding on him as to purchasers from the other who make improvements relying upon the supposed boundary. Notice to such purchasers that he does not recognize the line as the true boundary is sufficient, however, to save his rights, and he need not actually take steps to prevent their trespass.<sup>3</sup>

**364. Long acquiescence by the owners of adjoining lands in the location of the dividing line between their lands may have the effect of an agreement in establishing such line, if the acquiescence be for a period of time equal to that fixed by the statute of limitations.<sup>4</sup> It has been said that a supposed boundary line,**

<sup>1</sup> *Burnell v. Maloney*, 39 Vt. 579; *Lemmon v. Hartsook*, 80 Mo. 13; *Cheaney v. Nebraska, &c. Stone Co.* 41 Fed. Rep. 740; *Golterman v. Schiermeier* (Mo.), 28 S. W. Rep. 616.

<sup>2</sup> *Mullaney v. Duffy*, 145 Ill. 559, 565, 33 N. E. Rep. 750, per Shope, J.: "Where the estoppel is sought to be established from the silence of a party who in equity and good conscience should have spoken, as it is here, if there be any ground of estoppel, it is essential that the party should have had knowledge of the facts, and the other party have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence." *Smith v. Newton*, 38 Ill. 230; *Noble v. Chrisman*, 88 Ill. 186; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Hill v. Blackwelder*, 113 Ill. 283.

<sup>3</sup> *Hefner v. Downing*, 57 Tex. 576.

<sup>4</sup> *Alabama*: *Hoffman v. White*, 90 Ala. 354, 7 So. Rep. 816. *California*: *White v. Spreckels*, 75 Cal. 610, 17 Pac. Rep. 715; *Columbet v. Pacheco*, 48 Cal. 395, 397; *Cooper v. Vierra*, 59 Cal. 282; *Sneed v. Osborn*, 25 Cal. 619; *Helm v. Wilson*, 76 Cal. 476, 18 Pac. Rep. 604; *Burris v. Fitch*, 76 Cal. 395, 18 Pac. Rep. 864. *Connecticut*: *Rathbun v. Geer*, 64 Conn. 421, 30 Atl. Rep. 60. *District of Columbia*: *Neale v. Lee*, 19 D. C. 5. *Florida*: *Liddon v. Hartwell*, 22 Fla. 442. *Illinois*: *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150; *Darst v. Enlow*, 116 Ill. 475. *Iowa*: *Doolittle v. Bailey*, 85 Iowa, 398, 52 N. W. Rep. 337; *Wilson v. Gunning*, 80 Iowa, 331, 45 N. W. Rep. 920. *Kansas*: *Sheldon v. Atkinson*, 38 Kans. 14, 16 Pac. Rep. 68. *Kentucky*:

long acquiesced in, is better evidence of the true location of the line than any survey made after the original monuments have disappeared.<sup>1</sup> "The acquiescence in such cases affords ground not merely for an inference of fact, to go to the jury as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary. Unless the acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance. The rule seems to have been adopted as a rule of repose, with a view to the quieting of titles, and rests upon the same reason as our statute prohibiting the disturbance of an adverse possession which has continued for twenty years. In all cases in which practical locations have been confirmed upon evidence

*Belknap v. Louisville*, 93 Ky. 444, 20 S. W. Rep. 309; *Critchlow v. Beatty* (Ky.), 23 S. W. Rep. 960; *Hammond v. Williams* (Ky.), 9 S. W. Rep. 711; *Scheible v. Hart* (Ky.), 12 S. W. Rep. 628. **Maine**: *Walker v. Simpson*, 80 Me. 143, 13 Atl. Rep. 580; *Faught v. Holway*, 50 Me. 24. **Massachusetts**: *Kellogg v. Smith*, 7 Cush. 375. In this case there was evidence of the understanding and occupation of various and successive owners for more than one hundred years. *Owen v. Bartholomew*, 9 Pick. 519. **Michigan**: *Flynn v. Glenn*, 51 Mich. 580, 17 N. W. Rep. 65; *Dupont v. Starring*, 42 Mich. 492; *Lecompte v. Lueders*, 90 Mich. 495, 51 N. W. Rep. 542. **Minnesota**: *Beardsley v. Crane*, 52 Minn. 537, 54 N. W. Rep. 740. **Missouri**: *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Battner v. Baker*, 108 Mo. 311, 18 S. W. Rep. 911; *Turner v. Baker*, 64 Mo. 218, 243, 27 Am. Rep. 226. **Nebraska**: *Benson v. Daly*, 38 Neb. 155, 56 N. W. Rep. 788; *Trussel v. Lewis*, 13 Neb. 415, 14 N. W. Rep. 155, 42 Am. Rep. 767; *Levy v. Yerga*, 25 Neb. 764, 41 N. W. Rep. 773; *Obernalt v. Edgar*, 28 Neb. 70, 44 N. W. Rep. 82. **New Hampshire**: *Dudley v. Elkins*, 39 N. H. 78; *Richardson v. Chickering*, 41 N. H. 380, 77 Am. Dec. 769. **New York**: *Avery v. Empire Woolen Co.* 82 N. Y. 582; *Clark v. Davis*, 19 N. Y. Supp. 191, 28 Abb. N. C. 135; *Baldwin v. Brown*, 16 N. Y. 359; *Adams v. Rockwell*, 16 Wend. 285; *Dibble v. Rogers*, 13 Wend. 536; *Pangburn v. Miles*, 10 Abb. N. C. 42; *Smith v. McAllister*, 14 Barb. 434, 436-438; *Rockwell v. Adams*, 7 Cow. 761, 762; *Kip v. Norton*, 12 Wend. 127, 27 Am. Dec. 120; *Ausable Co. v. Hargraves*, 1 N. Y. Supp. 42; *Hill v. Edie*, 1 N. Y. Supp. 480; *Dale v. Jackson*, 8 N. Y. Supp. 715. **North Carolina**: *Norcum v. Leary*, 3 Ired. 49. **Oregon**: *Richards v. Snider*, 11 Oreg. 197, 3 Pac. Rep. 177. **Pennsylvania**: *Kuhns v. Fennell* (Pa.), 15 Atl. Rep. 920; *Culbertson v. Duncan* (Pa.), 13 Atl. Rep. 966; *West Chester & P. R. Co.'s Appeal* (Pa.), 13 Atl. Rep. 214. **Rhode Island**: *O'Donnell v. Penney*, 17 R. I. 164, 20 Atl. Rep. 305. **Tennessee**: *Galbraith v. Lunsford*, 3 Pick. 89, 9 S. W. Rep. 365; *Gilchrist v. McGee*, 9 Yerg. 455. **Texas**: *King v. Mitchell*, 1 Tex. Civ. App. 701, 21 S. W. Rep. 50; *Davis v. Mitchell*, 65 Tex. 623; *Davis v. Smith*, 61 Tex. 18. **West Virginia**: *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. Rep. 400; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. Rep. 880. **Wisconsin**: *Pickett v. Nelson*, 71 Wis. 542; 37 N. W. Rep. 836; *Eiden v. Eiden*, 76 Wis. 435, 45 N. W. Rep. 322.

<sup>1</sup> *Tarpenning v. Cannon*, 28 Kans. 665, quoting Judge Cooley.



of this kind, the acquiescence has continued for a long period, rarely less than twenty years."<sup>1</sup>

When the statement of the boundaries is indefinite, much weight is to be given to the construction put upon the deed by the parties themselves by their acts and admissions.<sup>2</sup>

The rule of acquiescence appears to have been adopted as a rule of repose, for the purpose of quieting titles, and preventing the uncertainty and confusion, and consequent litigation, which would be likely to result from the disturbance of boundary lines so long established.<sup>3</sup>

Where a corner, or a line, supposed to have been established by the government in the surveys of public lands, has been acquiesced in by adjoining owners of such lands for many years, and improvements made, and the land broken up to the line thus established, there is a presumption in favor of such corner being the true one, which can only be overcome by clear proof that it was not established by the government.<sup>4</sup>

**365. Acquiescence is a question of fact, and each case must furnish its own rule, to be deduced from its own facts and circumstances.<sup>5</sup>**

<sup>1</sup> *Baldwin v. Brown*, 16 N. Y. 359, 363, per Selden, J.; *Reed v. McCourt*, 41 N. Y. 435; *Reed v. Farr*, 35 N. Y. 113; *Hubbell v. McCulloch*, 47 Barb. 287; *Jones v. Smith*, 64 N. Y. 180; *Stewart v. Patrick*, 68 N. Y. 450. The earlier cases in this State were decided upon the ground that acquiescence was evidence of an agreement between the parties. *Jackson v. Dysling*, 2 Caines, 198; *Jackson v. Veder*, 3 Johns. 8; *Jackson v. Dieffendorf*, 3 Johns. 269; *Rockwell v. Adams*, 7 Cow. 761; *Clark v. Wethey*, 19 Wend. 320.

<sup>2</sup> *Deery v. Cray*, 10 Wall. 263; *Hamm v. San Francisco*, 17 Fed. Rep. 119; *Truett v. Adams*, 66 Cal. 218, 5 Pac. Rep. 96; *Hastings v. Stark*, 36 Cal. 122; *Blaney v. Rice*, 20 Pick. 62, 32 Am. Dec. 204; *Stone v. Clark*, 1 Met. 378, 35 Am. Dec. 370; *Lovejoy v. Lovett*, 124 Mass. 270; *Richardson v. Chickering*, 41 N. H. 380, 77 Am. Dec. 769; *Fuller v. Carr*, 33 N. J. L. 157; *Jackson v. Perrine*, 35 N. J. L. 137; *Lodge v. Barnett*, 46 Pa. St. 477.

<sup>3</sup> *O'Donnell v. Penney*, 17 R. I. 164, 20

Atl. Rep. 305, per Matteson, J., citing *Baldwin v. Brown*, 16 N. Y. 359, 363, 364; *McCormick v. Barnum*, 10 Wend. 103, 109; *Smith v. McAllister*, 14 Barb. 434, 437; *Jackson v. Van Corlaer*, 11 Johns. 123, 127; *Kellogg v. Smith*, 7 Cosh. 375, 381.

In *Baldwin v. Brown*, *supra*, the court denies the soundness of the theory that a parol agreement, either actual or supposed, lies at the foundation of the rule, and holds that the supposition of such an agreement, in cases of long acquiescence, is entirely superfluous.

<sup>4</sup> *Coy v. Miller*, 31 Neb. 348, 47 N. W. Rep. 1046; *Carpenter v. Monks*, 81 Mich. 103, 45 N. W. Rep. 477; *Diehl v. Zanger*, 39 Mich. 601; *Beaubien v. Kellogg*, 69 Mich. 333, 37 N. W. Rep. 691, 696; *Hoffman v. Port Huron* (Mich.), 60 N. W. Rep. 831.

<sup>5</sup> *Koenigheim v. Sherwood*, 79 Tex. 508, 16 S. W. Rep. 23; *Floyd v. Rice*, 28 Tex. 841; *Beecher v. Galvin*, 71 Mich. 391, 39 N. W. Rep. 469; *Jackson v. Van Corlaer*, 11 Johns. 127.

Where there was a dispute as to the division line, and one of the adjoining owners occupied the disputed land, and the other, because misled by the adverse claim and by advice received in reference to it, acquiesced for less than twenty years in such occupation, he was not estopped from asserting his title.<sup>1</sup>

366. The distinction should be kept in mind that acquiescence in a boundary line without any agreement is not conclusive unless it is continued under circumstances of adverse occupation long enough to give title by prescription; while acquiescence in a boundary line which, by reason of uncertainty or dispute, the parties have established by agreement, need not be continued for any definite time.<sup>2</sup> The acquiescence is, then, of importance only as showing the agreement. "Where there can be no real doubt as to how the premises should be located according to cer-

<sup>1</sup> *Hinkley v. Crouse*, 125 N. Y. 730, 26 N. W. Rep. 452; *Baldwin v. Brown*, 16 N. Y. 359; *Reed v. Farr*, 35 N. Y. 113; *Reed v. McCourt*, 41 N. Y. 435; *Duffy v. Master-on*, 44 N. Y. 557; *Townsend v. Hayt*, 51 N. Y. 656.

<sup>2</sup> **Arkansas**: *Jordan v. Deaton*, 23 Ark. 704. **California**: *Silvarer v. Hansen*, 77 Cal. 586, 20 Pac. Rep. 136; *Cavanaugh v. Jackson*, 91 Cal. 580, 27 Pac. Rep. 931; *Johnson v. Brown*, 63 Cal. 391; *Biggins v. Champlin*, 59 Cal. 113; *Cooper v. Vierra*, 59 Cal. 282. **Illinois**: *Bloomington v. Cemetery*, 126 Ill. 221, 18 S. E. Rep. 298; *Quick v. Nitschelm*, 139 Ill. 251, 28 N. E. Rep. 926; *Sheets v. Sweeney*, 136 Ill. 336, 26 N. E. Rep. 648; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Schneider v. Botsch*, 90 Ill. 577; *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560. **Kentucky**: *Beyersdorfer v. Schultz* (Ky.), 2 S. W. Rep. 492; *Sebastian v. Keeton* (Ky.), 29 S. W. Rep. 23. **Michigan**: *Manistee Manuf. Co. v. Cogswell* (Mich.), 61 N. W. Rep. 884; *Stewart v. Carleton*, 31 Mich. 270; *Dupont v. Starring*, 42 Mich. 492, 4 N. W. Rep. 190; *Smith v. Hamilton*, 20 Mich. 433, 4 Am. Rep. 398; *Joyce v. Williams*, 26 Mich. 332; *Crouin v. Gore*, 38 Mich. 381; *Bird v. Stark*, 66 Mich. 654, 33 N. W. Rep. 754; *Jones v. Pahby*, 67 Mich. 459, 35 N. W. Rep. 152,

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11 Am. St. Rep. 589. As was said in *Bird v. Stark*: "It is undoubtedly true, under our decisions, that, to make an arrangement less than fifteen years old binding, it must have been made with the understanding that it should be so regarded." **Missouri**: *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226. **New Hampshire**: *Orr v. Hadley*, 36 N. H. 575. **New York**: *Clark v. Wethey*, 19 Wend. 320; *Clark v. Baird*, 9 N. Y. 183; *Terry v. Chandler*, 16 N. Y. 354, 69 Am. Dec. 707; *Baldwin v. Brown*, 16 N. Y. 359; *Hubbell v. McCulloch*, 47 Barb. 287; *Patten v. Stitt*, 6 Rob. 431. **Tennessee**: *Chadwell v. Chadwell*, 93 Tenn. 201, 23 S. W. Rep. 973. **Texas**: *Alliance Milling Co. v. Eaton*, 86 Tex. 401, 23 S. W. Rep. 455; *Cooper v. Austin*, 58 Tex. 494; *Levy v. Maddox*, 81 Tex. 210, 16 S. W. Rep. 877; *Lecomte v. Toudouze*, 82 Tex. 212, 213, 17 S. W. Rep. 1047; *Adams v. Half* (Tex.), 24 S. W. Rep. 334; *Harn v. Smith*, 79 Tex. 310, 15 S. W. Rep. 240; *Blassingame v. Davis*, 68 Tex. 595, 5 S. W. Rep. 402; *Coleman v. Smith*, 55 Tex. 254; *Bailey v. Baker*, 4 Tex. Civ. App. 395, 23 S. W. Rep. 454. **Utah**: *Switzgable v. Worseldine*, 5 Utah, 315, recognizing general principle, which was held not applicable to the case.

tain and known boundaries described in the deed, to establish a practical location different therefrom . . . there must be either a location which has been acquiesced in for a sufficient length of time to bar a right of entry under the statute in relation to real estate, or the erroneous line must have been agreed upon between the parties claiming the land on both sides thereof; or the party whose right is to be thus barred must have silently looked on and seen the other party doing acts, or subjecting himself to expenses in relation to the land on the opposite side of the line which would be an injury to him, and which he would not have done if the line had not been so located, in which case, perhaps, a grant might be presumed within the twenty years."<sup>1</sup>

**367. An agreement or acquiescence in a wrong boundary when the true boundary is known, or can be ascertained from the deed, is treated both in law and equity as a mistake, and neither party is estopped from claiming the true line.<sup>2</sup> Accordingly, where adjoining landowners employ a surveyor to run the boundary line between the lands, not because they have a dispute about it, but merely because they are ignorant of its exact location, the line so run, if incorrectly located, is not conclusive on the parties, even though they acquiesce in it believing it to be correct.<sup>3</sup>**

<sup>1</sup> *Adams v. Rockwell*, 16 Wend. 285, 302, per Walworth, Ch.

<sup>2</sup> See, as bearing upon the principle, *Richard v. Williams*, 7 Wheat. 59, 106; *Bradstreet v. Huntington*, 5 Pet. 402; *Shraeder M. & M. Co. v. Packer*, 129 U. S. 688, 9 Sup. Ct. Rep. 385; *Jenkins v. Trager*, 40 Fed. Rep. 726. **Kentucky**: *Scheible v. Hart* (Ky.), 12 S. W. Rep. 628. **Massachusetts**: *Boston & W. R. Co. v. Sparhawk*, 5 Met. 469; *Whitney v. Holmes*, 15 Mass. 152; *Cleveland v. Flagg*, 4 Cush. 76; *Liverpool Wharf v. Prescott*, 7 Allen, 494; *Putnam v. Putnam Machine Co.* 137 Mass. 159. **Missouri**: *Knowlton v. Smith*, 36 Mo. 507, 88 Am. Dec. 152; *Golterman v. Schiermerer* (Mo.), 28 S. W. Rep. 616. **New York**: *Adams v. Rockwell*, 16 Wend. 285; *Sanford v. McDonald*, 53 Hun, 263. **North Carolina**: *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. Rep. 1033. **Pennsylvania**: *Perkins v. Gay*, 3 Serg. & R. 327, 8 Am.

Dec. 653. **Texas**: *Bohny v. Petty*, 81 Tex. 524, 17 S. W. Rep. 80. **Vermont**: *Russell v. Maloney*, 39 Vt. 579. **West Virginia**: *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E. Rep. 153. **Wisconsin**: *Hartung v. Witte*, 59 Wis. 286, 18 N. W. Rep. 175.

<sup>3</sup> *Pickett v. Nelson*, 79 Wis. 9, 47 N. W. Rep. 936. In *Hartung v. Witte*, 59 Wis. 286, 298, *Orton, J.*, said: "There must be an uncertainty as to the true line, and some question, dispute, or controversy about it which can be settled by such an agreement or acquiescence. In other words, that is certain which can be made certain; and if the true line cannot be made certain by the deed and a survey, or by the calls and monuments mentioned in the deed, then only it may be made certain by an agreement or acquiescence of the parties. There must be such uncertainty as to cause a dispute or controversy of the parties before resort can be

Where the owner of land, desiring to break it, calls upon the owner of adjoining land to point out the boundary between them, and the latter indicates what he supposes to be the line, no estoppel is created against such adjoining owner to claim the true line if different from the one pointed out; though there might be such an estoppel in case the first-named owner had erected valuable buildings on the faith of the boundary so pointed out.<sup>1</sup>

**368.** If adjoining owners hold to a division fence or line under the mistaken belief that it is the true line, such occupation, though continuous and uninterrupted, is not adverse. Such occupation without the intention of claiming beyond the true line is no evidence of an agreement between such owners establishing the line of occupation as the division line between them. Possession in accordance with a division fence, built for convenience and not to establish a line, is no bar to a claim of title according to the true line.<sup>2</sup>

**369.** That a fence has been maintained between adjoining owners for convenience only, without any intention of fixing the limits of ownership between them, is not evidence of adverse possession.<sup>3</sup> Thus a brush fence maintained near the line between

had to such evidence. In this deed there is no uncertainty as to the true west line of the premises, and there is no evidence of any question or dispute of the parties concerning it, and both parties know or can ascertain where the true line is. . . . When the true line can be ascertained by a correct survey, it is considered certain." Citing *Coats v. Taft*, 12 Wis. 388; *Colcord v. Alexander*, 67 Ill. 581; *Canal Co. v. Kinzie*, 93 Ill. 415; *Fowler v. The People*, 93 Ill. 116; *Smiley v. Fries*, 104 Ill. 416.

<sup>1</sup> *Heinz v. Cramer*, 84 Iowa, 497, 51 N. W. Rep. 173; *Boston & W. R. Co. v. Sparhawk*, 5 Met. 469; *Adams v. Rockwell*, 16 Wend. 285; *Hefner v. Downing*, 57 Tex. 576.

<sup>2</sup> *Golterman v. Schiermeier (Mo.)*, 28 S. W. Rep. 616; *Skinker v. Haagsma*, 99 Mo. 208, 12 S. W. Rep. 659; *Krider v. Milner*, 99 Mo. 145, 12 S. W. Rep. 461; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. Rep. 549; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Atchison v. Pease*, 96 Mo. 566, 10 S. W. Rep. 159; *Finch v. UHman*,

105 Mo. 255, 16 S. W. Rep. 863; *Kincaid v. Dormey*, 47 Mo. 337; *Walbrunn v. Ballen*, 68 Mo. 164; *Tamm v. Kellogg*, 49 Mo. 118; *Thomas v. Babb*, 45 Mo. 384; *Houx v. Batteen*, 68 Mo. 84; *St. Louis University v. McCune*, 28 Mo. 481; *Acton v. Dooley*, 74 Mo. 63; *Goldsborough v. Pidduck*, 87 Iowa, 599, 54 N. W. Rep. 431; *King v. Brigham (Oreg.)*, 31 Pac. Rep. 601; *McAfferty v. Connover*, 7 Ohio St. 99, 70 Am. Dec. 57; *Bobo v. Richmond*, 25 Ohio St. 115; *Mills v. Penny*, 74 Iowa, 172, 37 N. W. Rep. 135; *Skinner v. Crawford*, 54 Iowa, 119, 6 N. W. Rep. 144; *Grube v. Wells*, 34 Iowa, 148; *Maple v. Stevenson*, 122 Ind. 368, 23 N. E. Rep. 854; *Silver Creek Cement Co. v. Union Lime Co. (Ind.)* 35 N. E. Rep. 125.

<sup>3</sup> *Smith v. Hosmer*, 7 N. H. 436, 28 Am. Dec. 354; *Clough v. Bowman*, 15 N. H. 504; *Knight v. Coleman*, 19 N. H. 118; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Burrell v. Burrell*, 11 Mass. 294; *Krider v. Milner*, 99 Mo. 145, 12 S. W. Rep. 461, 17 Am. St. Rep. 549; *Walbrunn*

adjoining owners, and continued for forty years, but not at all times in the same place, does not bind either party to the line usually occupied by such fence.<sup>1</sup> Neither are the parties in such case bound for the reason that they have cut wood, or pastured their cattle, or mowed the grass, up to such fence, each on his own side and never on the other side.<sup>2</sup>

A fence between adjoining owners, placed by mistake on a line different from the true boundary line, does not estop the owner upon whose land the fence stands from claiming up to the true line; and his grantee, under a deed conveying the land "bounded by lands of" his adjoining owner, may claim title according to the true boundary line, and is not restricted to the line of the grantor's occupation as shown by the fence.<sup>3</sup>

A fence erected by an adjoining owner nearly on the true line is not notice to the other that any portion of his land is inclosed. He is justified in assuming that his neighbor is inclosing only his own land, and is not estopped to claim to the true line.<sup>4</sup>

**370. A permanent fence built by adjoining owners, on what they supposed to be the true line between them, is evidence of an agreement to establish the line in accordance with the line of the fence.<sup>5</sup> But a permanent fence built upon a portion of the line between such owners does not entitle either of them to hold by adverse possession upon another part of the same line, when a temporary fence has been kept up varying from the line of the permanent fence.<sup>6</sup>**

**371. The position of old fences may be considered in ascertaining disputed boundaries;<sup>7</sup> and the conduct of the parties with reference to such fences may be such as to authorize the conclusion that the fences were established by agreement of the parties, or have been recognized by them for such a length of time as to determine the line of ownership between the parties.**

*v. Ballen*, 68 Mo. 165; *Kincaid v. Dormey*, 47 Mo. 337; *Jackson v. Schoonmaker*, 2 Johns. 230, per Kent, C. J.; *Jackson v. Warford*, 7 Wend. 62; *Brown v. Cockrell*, 33 Ala. 38; *Alexander v. Wheeler*, 78 Ala. 167; *Hass v. Plantz*, 56 Wis. 105, 14 N. W. Rep. 65.

<sup>1</sup> *Smith v. Hosmer*, 7 N. H. 436.

<sup>2</sup> *Smith v. Hosmer*, 7 N. H. 436; *Doolittle v. Tice*, 41 Barb. 181.

<sup>3</sup> *Cleaveland v. Flagg*, 4 Cush. 76.

<sup>4</sup> *Hockmoth v. Des Grands Champs*, 71 Mich. 520, 39 N. W. Rep. 737.

<sup>5</sup> *Smith v. Hosmer*, 7 N. H. 436, 28 Am. Dec. 354.

<sup>6</sup> *Smith v. Hosmer*, 7 N. H. 436, 28 Am. Dec. 354.

<sup>7</sup> *Hoffman v. Port Huron* (Mich.), 60 N. W. Rep. 831.

Fences built by adjoining lot-owners on the line of the street, according to stakes set by the surveyors soon after the original survey was made, and maintained for forty-five years, are better evidence of the location of such line than a new survey, made forty years after the original survey, which changes such line.<sup>1</sup> Evidence that there was a very ancient fence between the lots of adjoining owners, and that the fence has been maintained as it now stands for about forty years, and that during such time the owners have openly and continuously held possession under a claim of right up to the line of such fence, warrants a finding that the fence was erected by agreement of the parties; and a slight variation from the position of the boundary line as described in a deed made sixty years ago, when the land was of little value, does not affect the conclusiveness of the evidence.<sup>2</sup>

**372. If a mistake has been made by the parties in locating a division line or fence, this may be corrected, if it has not been acted upon for too long a time and no injustice will be done.<sup>3</sup> The mistake must, however, be a material one;<sup>4</sup> and it must be corrected before rights have been acquired by presumption.<sup>5</sup> Thus, where a division fence between lands of adjoining owners had been standing more than twenty-one years, it constitutes the boundary line between them, although it is crooked and the deeds of both parties call for a straight line between acknowledged landmarks.<sup>6</sup>**

Where the grantee under a defective description takes possession of the land actually intended to be conveyed, a court of equity may, as against the grantor, correct the description.<sup>7</sup>

**373. A court of equity has no jurisdiction to fix boundaries merely because they are disputed or uncertain. To give such jurisdiction there must be some equity superinduced by the act to the parties or their situation or relation.<sup>8</sup> "Among the**

<sup>1</sup> *Ravine v. Emerson* (Wis.), 55 N. W. Rep. 177.

<sup>2</sup> *Beckman v. Davidson*, 162 Mass. 347, 39 N. E. Rep. 38. See cases cited by Knowlton, J.

<sup>3</sup> *Meukens v. Blumenthal*, 27 Mo. 198; *Lemmon v. Hartsook*, 80 Mo. 13; *Cunningham v. Roberson*, 1 Swan, 138; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. Rep. 549.

<sup>4</sup> *Cunningham v. Roberson*, 1 Swan, 138.

<sup>5</sup> *Dyer v. Eldridge* (Ind.), 36 N. E. Rep. 522; *Hoffman v. White*, 90 Ala. 354, 7 So. Rep. 816.

<sup>6</sup> *McCoy v. Hance*, 28 Pa. St. 149.

<sup>7</sup> *Dwight v. Tyler*, 49 Mich. 614, 14 N. W. Rep. 567.

<sup>8</sup> 1 Story Eq. Jur. § 615, 3 Pom. Eq. Jur. § 1384; *Norris's App.* 64 Pa. St. 275; *Wilson v. Hart*, 98 Mo. 618, 12 S. W. Rep. 249, 250.

grounds of equitable interference may be mentioned multiplicity of suits, irreparable mischief not easily measured by damages, fraud or mistake."<sup>1</sup>

Even in case there has been a mistake as to the boundary line, and one owner has placed a building a little over the line upon land of the adjoining owner, a court of equity will not order the removal of the building, but will leave the party to his remedy at law. The court may, however, enter a decree that, if the plaintiff will release the strip of land so built upon within a certain time, judgment shall be entered for the value of the land as found by a referee and costs. The court will not aid the plaintiff in obtaining an exorbitant price for land which is comparatively valueless except for purposes of litigation.<sup>2</sup>

**374.** In some States there are statutes providing for establishing disputed boundaries by an official survey. To make such a survey final and binding upon the parties, notices must be given, and all proceedings had in substantial conformity with the statute.<sup>3</sup> The fact that notice was given to the parties to be affected should appear on the face of the proceedings.<sup>4</sup>

Authority under an equitable proceeding to ascertain the true boundary lines between adjacent lands cannot be extended to the determination of the title. Title must be determined by a suit at law to recover the land. It is true that the determination of the boundary may involve the title to some portion of the land. "The distinction is between cases which are prosecuted with the ostensible object of determining the true boundary line between the parties and those brought to recover lands claimed by the defendant to be embraced within this boundary line as against the line claimed by the plaintiff."<sup>5</sup>

**375.** The declarations of deceased persons made while in possession of land, and in the act of pointing out their boundaries, are admissible in evidence as to such boundaries when

<sup>1</sup> Sedg. & Waite, Tr. Title Land, § 865.

<sup>4</sup> Davis v. Howell, 47 N. J. L. 280.

<sup>2</sup> Hunter v. Carrol, 64 N. H. 572, 15 Atl. Rep. 17; Clark v. Society, 46 N. H. 272.

<sup>5</sup> King v. Brigham, 23 Oreg. 262, 31 Pac. Rep. 601; Love v. Morrill, 19 Oreg. 545, 24 Pac. Rep. 916; Norris' App. 64 Pa. St. 275, 279; West Hartford Soc. v. First Baptist Church, 35 Conn. 117, 120.

<sup>3</sup> Holliday v. Maddox, 39 Kans. 359, 18 Pac. Rep. 299; Schwab v. Stoneback, 49 Kans. 607, 31 Pac. Rep. 142; Marsh v. Chestnut, 14 Ill. 223; Neary v. Jones (Iowa), 56 N. W. Rep. 675.

nothing appears to show an interest to deceive or misrepresent.<sup>1</sup> It need not appear affirmatively that the declarations were against the interest of the person making them,<sup>2</sup> but they must be so in fact,<sup>3</sup> or it must at least appear that such person had no interest to make false representations;<sup>4</sup> and it must appear that they were made by a former owner in possession of the land at the time,<sup>5</sup> in the act of pointing out the boundaries.<sup>6</sup> The declarations must be those of a person who has since deceased.<sup>7</sup> The declarations derive their force from the fact that they accompany the act of pointing out the boundaries, and are thus a part of the act.<sup>8</sup>

376. In some States the declarations of a surveyor or other disinterested person since deceased are admissible in a controversy about such line, though not a former owner, if he was in a position to know a boundary line, corner, or monument, and the declarations were made before the controversy commenced,<sup>9</sup>

<sup>1</sup> *Hunnicut v. Peyton*, 102 U. S. 333; *Ellicott v. Pearl*, 10 Pet. 412. **California**: *Sharp v. Blankenship*, 79 Cal. 411, 21 Pac. Rep. 842. **Georgia**: *McLeod v. Swain*, 87 Ga. 156, 13 S. E. Rep. 315; *Towner v. Thompson*, 82 Ga. 740, 9 S. E. Rep. 672. **Kentucky**: *Scott v. Means Iron Co. (Ky.)* 18 S. W. Rep. 1012. **Maine**: *Simpson v. Blaisdell*, 85 Me. 199, 27 Atl. Rep. 101; *Royal v. Chandler*, 83 Me. 150, 21 Atl. Rep. 842. **Massachusetts**: *Chapman v. Edmands*, 3 Allen, 512; *Long v. Colton*, 116 Mass. 414; *Bartlett v. Emerson*, 7 Gray, 174; *Ware v. Brookhouse*, 7 Gray, 454; *Wood v. Foster*, 8 Allen, 24, 85 Am. Dec. 681; *Flagg v. Mason*, 8 Gray, 556; *Daggett v. Shaw*, 5 Met. 223. **New Hampshire**: *Smith v. Forrest*, 49 N. H. 230; *South Hampton v. Fowler*, 54 N. H. 197; *Great Falls Co. v. Worster*, 15 N. H. 412, 437; *Wood v. Fiske*, 62 N. H. 173; *Pike v. Hayes*, 14 N. H. 19, 40 Am. Dec. 171; *Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. Rep. 543. **New York**: *Partridge v. Russell*, 2 N. Y. Supp. 529. **North Carolina**: *Roberts v. Preston*, 100 N. C. 243, 6 S. E. Rep. 574. **Pennsylvania**: *Bender v. Pitzer*, 27 Pa. St. 333. **Texas**: *Evans v. Hurt*, 34 Tex. 111; *Hurt v. Evans*, 49 Tex. 311; *Windus v. James (Tex.)*, 19 S. W. Rep. 873; *Whitman v. Haywood*, 77 Tex. 557, 14 S. W. Rep. 166. **Vermont**: *Wood v. Willard*, 36 Vt. 82, 84 Am. Dec. 659.

<sup>2</sup> *Daggett v. Shaw*, 5 Met. 223; *Wood v. Foster*, 8 Allen, 24, 85 Am. Dec. 681.

<sup>3</sup> *Corbleys v. Ripley*, 22 W. Va. 154, 46 Am. Rep. 502; *Wood v. Willard*, 36 Vt. 82, 84 Am. Dec. 659.

<sup>4</sup> *Corbleys v. Ripley*, 22 W. Va. 154, 46 Am. Rep. 502; *Long v. Colton*, 116 Mass. 414.

<sup>5</sup> *Whitney v. Bacon*, 9 Gray, 206; *Chapman v. Twitchell*, 37 Me. 39, 58 Am. Dec. 773; *Partridge v. Russell*, 2 N. Y. Supp. 529; *Taylor v. Glenn*, 29 S. C. 292, 7 S. E. Rep. 483.

<sup>6</sup> *Hunnicut v. Peyton*, 102 U. S. 333, 363; *Lemmon v. Hartsook*, 80 Mo. 13; *Long v. Colton*, 116 Mass. 414; *Bartlett v. Emerson*, 7 Gray, 174; *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. Rep. 886.

<sup>7</sup> *Flagg v. Mason*, 8 Gray, 556; *Bartlett v. Emerson*, 7 Gray, 174; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334.

<sup>8</sup> *Hunnicut v. Peyton*, 102 U. S. 333, 363, per Strong, J.; *Bender v. Pitzer*, 27 Pa. St. 333.

<sup>9</sup> *Boardman v. Reed*, 6 Pet. 328; *Hunnicut v. Peyton*, 102 U. S. 333, 365; *Tucker v. Smith*, 68 Tex. 473, 3 S. W. Rep. 671; *McCausland v. Fleming*, 63



provided the declarations were made while the declarant was pointing out or marking the boundaries, or discharging some duty relating thereto.<sup>1</sup>

More generally, however, and upon sound principles, the rule is restricted to the admission of declarations only when made by persons owning the land and being at the time in possession of it;<sup>2</sup> and even then the declarations must be either a part of the *res gestæ*,<sup>3</sup> or be made against the interest of the owner. Thus the declarations of the owner, while standing on his land, in his own favor, are not competent evidence in favor of one claiming under him, to prove a right of way over adjacent land of another person.<sup>4</sup>

**377. The declarations of a surveyor made while he was engaged in making the survey are held admissible as a part of the *res gestæ*, and it is not necessary to prove his subsequent death.**<sup>5</sup>

Surveys by the same surveyor made at about the same time as a survey in dispute, and locating the same lines, are admissible as declarations of the surveyor, who is dead.<sup>6</sup> But declarations of a deceased surveyor, who was not present at or connected with the original survey, are inadmissible though he took part in a subdivision of the survey.<sup>7</sup>

Pa. St. 36; *Kramer v. Goodlander*, 98 Pa. St. 366; *Harriman v. Brown*, 8 Leigh, 697; *Hill v. Proctor*, 10 W. Va. 59, 84; *Bender v. Pitzer*, 27 Pa. St. 333; *George v. Thomas*, 15 Tex. 74, 67 Am. Dec. 612; *Stroud v. Springfield*, 28 Tex. 649; *Welder v. Carroll*, 29 Tex. 317; *Smith v. Russell*, 37 Tex. 247; *Tucker v. Smith*, 68 Tex. 473, 3 S. W. Rep. 671; *Smith v. Forrest*, 49 N. H. 230; *Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. Rep. 543; *Great Falls Co. v. Worster*, 15 N. H. 412; *Wood v. Willard*, 37 Vt. 377, 386, 86 Am. Dec. 716; *Bethca v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240; *Whitehurst v. Pettipher*, 87 N. C. 179, 42 Am. Rep. 520; *Smith v. Headrick*, 93 N. C. 210; *Fry v. Currie*, 91 N. C. 436; *Williams v. Kivett*, 82 N. C. 110; *Sasser v. Herring*, 3 Dev. L. 340; *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403; *Whalen v. Nisbet* (Ky.), 26 S. W. Rep. 188.

<sup>1</sup> *Ellicott v. Pearl*, 10 Pet. 412; *Hunnicut v. Peyton*, 102 U. S. 333; *Clay County Land Co. v. Montague County* (Tex. Civ. App.), 28 S. W. Rep. 704.

<sup>2</sup> *Hunnicut v. Peyton*, 102 U. S. 333; *Hall v. Mayo*, 97 Mass. 416; *Bartlett v. Emerson*, 7 Gray, 174; *Long v. Colton*, 116 Mass. 414; *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. Rep. 886, 60 Am. Rep. 584; *Horner v. Stillwell*, 35 N. J. L. 307; *Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *Hurt v. Evans*, 49 Tex. 311.

<sup>3</sup> *Deming v. Carrington*, 12 Conn. 1, 30 Am. Dec. 591.

<sup>4</sup> *Ware v. Brookhouse*, 7 Gray, 454.

<sup>5</sup> *George v. Thomas*, 16 Tex. 74, 67 Am. Dec. 612.

<sup>6</sup> *Cottingham v. Seward* (Tex. Civ. App.), 25 S. W. Rep. 797.

<sup>7</sup> § 376. *Angle v. Young* (Tex. Civ. App.), 25 S. W. Rep. 798.

**378. The declarations of a deceased surveyor made on the spot while running or pointing out a line are admissible to identify the monuments of a survey.**<sup>1</sup> Thus the declarations of a deceased surveyor, while making a survey, have been admitted to identify a monument pointed out by him as a corner of the same survey, established in making the original survey many years before, in which he had participated.

The decisions in South Carolina and Texas have gone the length of admitting not only evidence of the declarations of a deceased surveyor made while surveying the land, but also those of a deceased chain-bearer who had pointed out to the witness the place of a corner.<sup>2</sup>

**379. The opinion of a witness as to the location of a disputed division line is incompetent testimony,** though he had long been intimately acquainted with the premises.<sup>3</sup>

The opinion of surveyors to the effect that, when the land was originally surveyed, only one line of the survey was actually run, is inadmissible. It is the province of the jury to conclude from the facts proved whether or not the lines were actually run, or the survey was merely an office survey.<sup>4</sup>

**380. In some States, ancient boundaries in dispute, whether public or private, may be proved by the common reputation and understanding of the neighborhood where the land lies.** Such reputation or understanding, to be admissible, must be shown to be general and concurrent, and it must have been in existence before the controversy commenced in which it is used as evi-

<sup>1</sup> *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. Rep. 201, per Bradley, J.; *Hunnicut v. Peyton*, 102 U. S. 333; *George v. Thomas*, 16 Tex. 74, 67 Am. Dec. 612; *Blythe v. Sutherland*, 3 McCord, 258; *Stroud v. Springfield*, 28 Tex. 649; *Welder v. Carroll*, 29 Tex. 317; *Caufman v. Presbyterian Cong.* 6 Binn. 59; *Bender v. Pitzer*, 29 Pa. St. 333, 335; *Kennedy v. Lubold*, 88 Pa. St. 246; *McCausland v. Fleming*, 63 Pa. St. 36; *Kramer v. Goodlander*, 98 Pa. St. 366; *Bellas v. Cleaver*, 40 Pa. St. 260, *Tyrone Co. v. Cross*, 25 W. N. C. 97, 18 Atl. Rep. 519; *Sweigart v. Richards*, 8 Pa. St. 436; *Conn v. Penn*, 1 Pet. C. C. 496; *Boardman v. Reed*, 6 Pet. 328; *Commonwealth v. Frew*, 3 Pa. Co. Ct. Rep. 492; *Cherry v. Boyd*, Litt. Sel. Cas. 7; *Donohue v. Whitney*, 15 N. Y. Supp. 622; *Partridge v. Russell*, 2 N. Y. Supp. 529. The English cases admit hearsay to determine a private boundary when it is identical with a public boundary, as of a hamlet, parish, or manor. *Thomas v. Jenkins*, 6 Ad. & E. 525.

<sup>2</sup> *Speer v. Coate*, 3 McCord, 227; *Blythe v. Sutherland*, 3 McCord, 258; *Smith v. Russell*, 37 Tex. 247.

<sup>3</sup> *Beccher v. Galvin*, 71 Mich. 391, 39 N. W. Rep. 469.

<sup>4</sup> *Randall v. Gill*, 77 Tex. 351, 14 S. W. Rep. 134; *Reast v. Donald*, 84 Tex. 648, 19 S. W. Rep. 795.

dence.<sup>1</sup> Such proof must also show the boundary with reasonable certainty.<sup>2</sup>

Where the location of a private boundary depends upon showing the original section line, this may be shown by proof of general reputation.<sup>3</sup>

#### IV. *General Rules of Construction.*

**381.** It is a rule that monuments prevail, in cases of discrepancies, over courses and distances.<sup>4</sup> The ground of the

<sup>1</sup> *Stroud v. Springfield*, 28 Tex. 649; *Sexton v. Hollis*, 26 S. C. 231; *Jones v. Dean* (Ky.), 5 S. W. Rep. 470; *Nixon v. Porter*, 34 Miss. 697, 69 Am. Dec. 408; *Stetson v. Freeman*, 35 Kans. 523, 11 Pac. Rep. 431, as to boundary of a city; *Kinney v. Farnsworth*, 17 Conn. 355; *Wooster v. Butler*, 13 Conn. 309; *Goddard v. Parker*, 10 Oreg. 102; *Nys v. Biemeret*, 44 Wis. 104; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. Rep. 376; *Thoen v. Roche* (Minn.), 58 N. W. Rep. 686.

<sup>2</sup> *Nixon v. Porter*, 34 Miss. 697, 69 Am. Dec. 408.

<sup>3</sup> *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. Rep. 750.

<sup>4</sup> *Ayers v. Watson*, 113 U. S. 594, 5 Sup. Ct. Rep. 641; *Land Co. v. Saunders*, 103 U. S. 316, 322; *Morrow v. Whitney*, 95 U. S. 551; *United States v. Murray*, 41 Fed. Rep. 862; *Brown v. Huger*, 21 How. 305; *Barclay v. Howell*, 6 Pet. 498; *Cleveland v. Smith*, 2 Story, 278; *M'Iver v. Walker*, 9 Cranch, 173; 4 Wheat. 444; *Nelson v. Hall*, 1 McLean, 518. **Alabama**: *Guilmartin v. Wood*, 76 Ala. 204. **California**: *Walsh v. Hill*, 38 Cal. 481; *Piercy v. Crandall*, 34 Cal. 334; *Colton v. Seavey*, 22 Cal. 496; *Penry v. Richards*, 52 Cal. 496; *Adair v. White*, 85 Cal. 313, 24 Pac. Rep. 663; *Stoll v. Beccher*, 94 Cal. 1, 29 Pac. Rep. 327; *Anderson v. Richardson*, 92 Cal. 623, 28 Pac. Rep. 679; *Beaudry v. Doyle*, 68 Cal. 105; *Tognazzini v. Morganti*, 84 Cal. 159, 23 Pac. Rep. 1085. **Colorado**: *Hollenbeck v. Sykes*, 17 Colo. 317, 29 Pac. Rep. 380. **Connecticut**: *Nichols v. Turney*, 15 Conn. 101; *Belden v. Seymour*,

8 Conn. 19. **Florida**: *Hogans v. Carruth*, 19 Fla. 84; *Andreu v. Watkins*, 26 Fla. 390, 7 So. Rep. 876; *Daggett v. Willey*, 6 Fla. 482. **Georgia**: *Harris v. Hull*, 70 Ga. 831; *Benton v. Horsley*, 71 Ga. 619; *Georgia R. R. Co. v. Hamilton*, 59 Ga. 171. **Illinois**: *Cottingham v. Parr*, 93 Ill. 233; *Miller v. Beeler*, 25 Ill. 163; *Lincoln v. McLaughlin*, 74 Ill. 11; *England v. Vandermark*, 147 Ill. 76, 35 N. E. Rep. 465; *McClintock v. Rogers*, 11 Ill. 279; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150. **Indiana**: *Caspar v. Jamison*, 120 Ind. 58, 21 N. E. Rep. 743; *Simonton v. Thompson*, 55 Ind. 87; *Shepherd v. Nave*, 125 Ind. 226, 25 N. E. Rep. 220. **Iowa**: *Bolton v. Eggleston*, 61 Iowa, 163, 16 N. W. Rep. 62; *Yocum v. Haskins*, 81 Iowa, 436, 46 N. W. Rep. 1065; *Moreland v. Page*, 2 Iowa, 139; *Walrod v. Flanigan*, 75 Iowa, 365, 39 N. W. Rep. 645. **Kentucky**: *Bailey v. McConnell* (Ky.), 14 S. W. Rep. 337; *Baxter v. Everett*, 7 Mon. 329. **Louisiana**: *Gughlielmi v. Geismar*, 46 La. Ann. 280, 14 So. Rep. 501. **Maine**: *Bryant v. Maine Cent. R. Co.* 79 Me. 312, 9 Atl. Rep. 736; *Carville v. Hutchins*, 73 Me. 227; *Tyler v. Fickett*, 73 Me. 410; *Cilley v. Childs*, 73 Me. 130; *Melcher v. Merryman*, 41 Me. 601; *Haynes v. Young*, 36 Me. 557. **Maryland**: *Friend v. Friend*, 64 Md. 321, 1 Atl. Rep. 865; *Thomas v. Godfrey*, 3 Gill & J. 142; *Heck v. Remka*, 47 Md. 68; *Wilson v. Inloes*, 6 Gill, 121. **Massachusetts**: *Dodd v. Witt*, 139 Mass. 63, 29 N. E. Rep. 475, 52 Am. Rep. 700; *Woodward v. Nims*, 130 Mass. 70; *Foley v. McCarthy*, 157 Mass. 474, 32 N. E. Rep. 669; *Howe v.*

rule is, that mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visi-

Bass, 2 Mass. 380, 3 Am. Dec. 59; Frost v. Augier, 127 Mass. 212; Morse v. Rogers, 118 Mass. 572; Sanborn v. Rice, 129 Mass. 387; Frost v. Spaulding, 19 Pick. 445, 31 Am. Dec. 150; Pernam v. Wead, 6 Mass. 131; Davis v. Rainsford, 17 Mass. 207. **Michigan**: Twogood v. Hoyt, 42 Mich. 609, 4 N. W. Rep. 445; Brown v. Morrill, 91 Mich. 29, 51 N. W. Rep. 700. **Minnesota**: Nicolin v. Schneiderhan, 37 Minn. 63, 33 N. W. Rep. 33; Turnbull v. Schroeder, 29 Minn. 49, 11 N. W. Rep. 147; Coles v. Yorks, 36 Minn. 388, 31 N. W. Rep. 353; Yanish v. Tarbox, 49 Minn. 268, 51 N. W. Rep. 1051. **Mississippi**: O'Herrin v. Brooks, 67 Miss. 266, 6 So. Rep. 844; Potts v. Canton Warehouse Co. 70 Miss. 462, 12 So. Rep. 147. **Missouri**: Harding v. Wright, 119 Mo. 1, 24 S. W. Rep. 211; Whittlesey v. Kellogg, 28 Mo. 404; Climer v. Wallace, 28 Mo. 556; Campbell v. Johnson, 44 Mo. 250; Smith v. Catlin Land Co. 117 Mo. 438, 22 S. W. Rep. 1083; Kronenberger v. Hoffner, 44 Mo. 185; Rutherford v. Tracy, 48 Mo. 326; Kellogg v. Mullen, 45 Mo. 571; Jamison v. Fopiano, 48 Mo. 194; Cooley v. Warren, 53 Mo. 166; West v. Bretelle, 115 Mo. 653, 22 S. W. Rep. 705; Shewalter v. Pirner, 55 Mo. 218; Blumenthal Real Estate Co. v. Broch (Mo.), 29 S. W. Rep. 836. **Nebraska**: Thompson v. Harris, 40 Neb. 230, 58 N. W. Rep. 712; Johnson v. Preston, 9 Neb. 474. **New Hampshire**: Cunningham v. Curtis, 57 N. H. 157; Coburn v. Coxeter, 51 N. H. 158; Smith v. Dodge, 2 N. H. 303; Griffin v. Bixby, 12 N. H. 454, 37 Am. Dec. 225. **New Jersey**: Smith v. Negbauer, 42 N. J. L. 305; Andrews v. Rue, 34 N. J. L. 402; Opdyke v. Stephens, 28 N. J. L. 83; McCullough v. Absecon Imp. Co. 48 N. J. Eq. 170, 21 Atl. Rep. 481; Curtis v. Aaronson, 49 N. J. L. 68, 7 Atl. Rep. 886; Kalbfleisch v. Standard Oil Co. 43 N. J. L. 259. **New York**: Case v. Dexter, 106 N. Y. 548, 13 N. E. Rep. 449; Thayer v. Finton, 108 N. Y. 394, 15 N. E. Rep. 615; Arden v. Thompson, 5 Cow. 371; Casey v. Dunn, 8 N. Y. Supp. 305; Baldwin v. Brown, 16 N. Y. 359; Drew v. Swift, 46 N. Y. 204; Wendell v. People, 8 Wend. 183, 22 Am. Dec. 635; Seneca Nation v. Hugaboom, 132 N. Y. 492, 30 N. E. Rep. 983; Lovejoy v. Tietjen, 47 Hun, 321; Muhler v. Ruppert, 124 N. Y. 627, 26 N. E. Rep. 313. **North Carolina**: West v. Shaw, 67 N. C. 439; Credle v. Hays, 88 N. C. 321; Buckner v. Anderson, 111 N. C. 572, 16 S. E. Rep. 424; Proctor v. Pool, 4 Dev. 370; Shaffer v. Hahn, 111 N. C. 1, 15 S. E. Rep. 1033; Bonaparte v. Carter, 106 N. C. 534, 11 S. E. Rep. 262; Cowles v. Reavis, 109 N. C. 417, 13 S. E. Rep. 930; Cox v. McGowan (N. C.), 21 S. E. Rep. 108. **Ohio**: Wyckoff v. Stephenson, 14 Ohio, 13; Alseire v. Hulse, 5 Ohio, 534. **Oregon**: Lewis v. Lewis, 4 Ore. 177; Anderson v. McCormick, 18 Ore. 301, 22 Pac. Rep. 1062; King v. Brigham, 19 Ore. 560, 25 Pac. Rep. 150. **Pennsylvania**: Breneiser v. Davis, 134 Pa. St. 1; Watson v. Jones, 85 Pa. St. 117; Morse v. Rollins, 121 Pa. St. 537, 15 Atl. Rep. 645; Burkholder v. Markley, 98 Pa. St. 37; Lodge v. Barnett, 46 Pa. St. 477. **South Carolina**: Sturgeon v. Floyd, 3 Rich. L. 80; Fullwood v. Graham, 1 Rich. 491. **Tennessee**: Lewis v. Oakley, 10 Heisk. 483; Disney v. Coal Creek Min. Co. 11 Lea, 607; Bleidorn v. Pilot Mt. Coal Co. 89 Tenn. 166, 204, 15 S. W. Rep. 737. **Texas**: Stafford v. King, 30 Tex. 257, 94 Am. Dec. 304; Booth v. Strippleman, 26 Tex. 436; Welder v. Hunt, 34 Tex. 44; Titterington v. Trees, 78 Tex. 567, 14 S. W. Rep. 692; Mitchell v. Burdett, 22 Tex. 633; Davis v. Baylor (Tex.), 19 S. W. Rep. 523; Linney v. Wood (Tex.), 17 S. W. Rep. 244; Randall v. Gill, 77 Tex. 351, 14 S. W. Rep. 134; Roberts v. Helms (Tex. Civ. App.), 20 S. W. Rep. 1004; Wyatt v. Foster, 79 Tex. 413, 15 S. W. Rep. 679; Luckett v. Scruggs, 73 Tex. 519, 11 S. W. Rep. 529; Bland v. Smith (Tex. Civ. App.), 26 S.

ble and permanent.<sup>1</sup> A description by course and distance is regarded as the most uncertain kind of description, because mistakes are liable to occur in the making of the survey, in entering the minutes of it, and in copying the same from the field-book.<sup>2</sup> "Consequently, if marked trees and marked corners be found conformably to the calls of the patent, or if watercourses be called for in the patent, or mountains or other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects."<sup>3</sup> In locating lands, the following calls are resorted to, and generally in the order stated: (1) Natural boundaries; (2) artificial marks; (3) adjacent boundaries; (4) course and distance, — course controlling distance, or distance course, according to circumstances;<sup>4</sup> but it has never been said that each of these occupies an inflexible position.

W. Rep. 773. **Vermont:** *Bagley v. Morrell*, 46 Vt. 94; *Church v. Stiles*, 59 Vt. 642; *Keenan v. Cavanaugh*, 44 Vt. 268; *Park v. Park*, 38 Vt. 545, 552. **Virginia:** *Norfolk Trust Co. v. Foster*, 78 Va. 413; *Dogan v. Seekright*, 4 Hen. & M. 125; *Clements v. Kyles*, 13 Gratt. 468, 480; *Coles v. Wooding*, 2 Pat. & H. 189; *Smith v. Davis*, 4 Gratt. 50. **West Virginia:** *Adams v. Alkire*, 20 W. Va. 480; *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. Rep. 400; *Gwynn v. Schwartz*, 32 W. Va. 487, 19 S. E. Rep. 880. **Wisconsin:** *Marsh v. Mitchell*, 25 Wis. 706; *Fleischfresser v. Schmidt*, 41 Wis. 223; *Miner v. Brader*, 65 Wis. 537, 27 N. W. Rep. 313; *Borkenhagen v. Vianden*, 82 Wis. 206, 52 N. W. Rep. 260.

<sup>1</sup> *Morrow v. Whitney*, 95 U. S. 551, 555; *McIver v. Walker*, 9 Cranch, 173, 178; *Clements v. Pearce*, 63 Ala. 284, 292; *Baldwin v. Brown*, 16 N. Y. 359; *Baxter v. Wilson*, 95 N. C. 137; *Strickland v. Dranghan*, 88 N. C. 315; *Keenan v. Cavanaugh*, 44 Vt. 268, 276; *Ferris v. Coover*, 10 Cal. 589; *Stafford v. King*, 30 Tex. 257, 271, 94 Am. Dec. 304. In this case *Smith, J.*, said: "The general rules are, that the location should be governed, first, by natural objects or boundaries, such as rivers, lakes, creeks, etc.; second, artificial marks, such as marked trees,

lines, stakes, etc.; and, third, course and distance. The true and correct location of the land is ascertained by the application of all or any of these rules to the particular case; and when they lead to contrary results or confusion, that rule must be adopted which is most consistent with the intention apparent upon the face of the patent read in the light of the surrounding facts and circumstances. Of all these indicia of the locality of the true line as run by the surveyor, course and distance are regarded as the most unreliable, and generally distance more than course, for the reason that chain-carriers may miscount and report distances inaccurately, by mistake or design. At any rate, they are more liable to err than the compass."

<sup>2</sup> *Credle v. Hays*, 88 N. C. 321; *Houser v. Belton*, 10 Ired. 358; *Herbert v. Wise*, 3 Call, 239.

<sup>3</sup> *McIver v. Walker*, 9 Cranch, 173, 177, per *Marshall, C. J.* And see *Burkholder v. Marskley*, 98 Pa. St. 37; *Dogan v. Seekright*, 4 Hen. & M. 125; *Randall v. Gill*, 77 Tex. 351, 14 S. W. Rep. 134.

<sup>4</sup> *Yanish v. Tarbox*, 49 Minn. 268, 51 N. W. Rep. 1051; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150; *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. Rep. 400, per *Holt, J.*; *Fulwood v. Graham*,

**382.** This rule applies where the monuments or boundaries described in the deed are certain, or capable of being made certain.<sup>1</sup> It does not apply where the monuments or boundaries cannot be found, where they contravene all the other terms of the description, or where an adherence to them would defeat the evident intent of the parties.<sup>2</sup> Though the monument referred to does not actually exist at the time, but is afterwards erected by the parties with the intention that it shall conform to the deed, it will control.<sup>3</sup>

**383.** But a call for a monument in a deed does not control absolutely, so as to preclude the consideration of other evidence as to the true locality of the land.<sup>4</sup> Courses and distances will prevail over monuments, if the former best comport with the circumstances of the case and the manifest intention of the parties.<sup>5</sup> When it is manifest there is a mistake as to the monument, or the monuments are uncertain, inferior evidence of location may control the higher.<sup>6</sup> Where the boundary is not fixed and known, and the location of monuments is in dispute, lost, or left in doubt by the evidence, courses and distances will be considered

<sup>1</sup> Rich. 491; *Gordon v. Booker*, 97 Cal. 586, 32 Pac. Rep. 593; *Rand v. Cartwright*, 82 Tex. 399, 18 S. W. Rep. 794.

<sup>2</sup> *Morse v. Rogers*, 118 Mass. 572, 578; *George v. Wood*, 7 Allen, 14; *Wharton v. Garvin*, 34 Pa. St. 340; *Coughran v. Alderete* (Tex. Civ. App.), 26 S. W. Rep. 109; *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. Rep. 256.

<sup>3</sup> *White v. Luning*, 93 U. S. 514; *Murdock v. Chapman*, 9 Gray, 156; *Parks v. Loomis*, 6 Gray, 467; *Davis v. Rainsford*, 17 Mass. 207; *Mizell v. Simmons*, 79 N. C. 182; *Hanson v. Red Rock* (S. D.), 57 N. W. Rep. 11; *Davidson v. Killen*, 68 Tex. 406, 4 S. W. Rep. 561.

<sup>4</sup> *Makepeace v. Bancroft*, 12 Mass. 469; *Owen v. Bartholomew*, 9 Pick. 520; *Kennebec Purchase v. Tiffany*, 1 Me. 219, 10 Am. Dec. 60.

<sup>5</sup> *Jones v. Burgett*, 46 Tex. 284; *Big-ham v. McDowell*, 69 Tex. 100, 7 S. W. Rep. 315; *Linney v. Wood*, 66 Tex. 22, 17 S. W. Rep. 244; *Jones v. Andrews*,

72 Tex. 5, 9 S. W. Rep. 170; *Cannon v. Emmans*, 44 Minn. 294, 46 N. W. Rep. 356; *Buckner v. Hendrick* (Ky.), 1 S. W. Rep. 646.

<sup>6</sup> *Hale v. Cottle*, 21 Oreg. 580, 28 Pac. Rep. 901; *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. Rep. 400; *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. Rep. 13; *Titterington v. Trees*, 78 Tex. 567, 14 S. W. Rep. 692; *Scott v. Weisburg*, 3 Tex. Civ. App. 46, 21 S. W. Rep. 769; *Davis v. Rainsford*, 17 Mass. 207; *Parks v. Loomis*, 6 Gray, 467; *Murdock v. Chapman*, 9 Gray, 156; *Flagg v. Thurston*, 13 Pick. 145; *Coburn v. Coxeter*, 51 N. H. 158; *White v. Gay*, 9 N. H. 126; *Hamilton v. Foster*, 45 Me. 32; *Evans v. Weeks*, 6 Rich. 83.

<sup>7</sup> *Fulwood v. Graham*, 1 Rich. 491; *Hollenbeck v. Sykes*, 17 Colo. 317, 29 Pac. Rep. 380; *Cannon v. Emmans*, 44 Minn. 294, 46 N. W. Rep. 356; *Blackburn v. Nelson*, 100 Cal. 336, 34 Pac. Rep. 775; *Yanish v. Tarbox*, 49 Minn. 268, 51 N. W. Rep. 1051.

in fixing boundaries.<sup>1</sup> Where no monuments are referred to in the description, and none are intended to be erected, the distance stated therein must control the location.<sup>2</sup>

384. A monument inadvertently referred to, or inconsistent with the rest of the description, may be rejected.<sup>3</sup> And so, if the monuments described in a deed cannot be found, nor their location proven, resort must be had to other parts of the description to identify the land; and courses and distances, if they are given and appear to be correct, may be relied upon.<sup>4</sup> "The courses and distances," says Chief Justice Marshall, "are less certain and less permanent guides to the land which was actually surveyed and granted than natural and fixed objects on the ground; but they are guides to some extent, and, in the absence of all others, must govern us. If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us, and must be used."<sup>5</sup>

When it is apparent upon the face of the deed that the intention was to convey a specific quantity of land, if the courses and distances given would include that precise quantity, but the description by fixed monuments would embrace more or less, it is clear that the former should be followed. To do otherwise would be to defeat the plain intent of the parties.<sup>6</sup>

<sup>1</sup> *Hanson v. Red Rock* (S. D.), 57 N. W. Rep. 11; *Yocum v. Haskins*, 81 Iowa, 436, 46 N. W. Rep. 1065.

<sup>2</sup> *Chinoweth v. Haskell*, 3 Pet. 92, 96, per Marshall, C. J.; *Negbauer v. Smith*, 44 N. J. L. 672; *Brenelser v. Davis*, 134 Pa. St. 1, 19 Atl. Rep. 433; *Dale v. Travellers' Ins. Co.* 89 Ind. 473.

<sup>3</sup> *White v. Luning*, 93 U. S. 514; *Parks v. Loomis*, 6 Gray. 467; *Bosworth v. Sturtevant*, 2 Cush. 393; *Thatcher v. Howland*, 2 Met. 41; *Fitzgerald v. Brennan*, 57 Conn. 511, 18 Atl. Rep. 743; *Davis v. Rainsford*, 17 Mass. 207; *Talbot v. Copeland*, 32 Me. 251; *Chandler v. Green*, 69 Me. 350; *Benton v. McIntire*, 64 N. H. 598, 15 Atl. Rep. 413; *Buffalo, N. Y. & Erie R. Co. v. Stigeler*, 61 N. Y. 348; *Negbauer v. Smith*, 44 N. J. L. 672; *Redmond v. Stepp*, 100 N. C. 212,

6 S. E. Rep. 727; *Browning v. Atkinson*, 37 Tex. 633; *Woods v. Robinson*, 58 Tex. 655; *Gordon v. Booker*, 97 Cal. 586, 32 Pac. Rep. 593; *Hale v. Cottle*, 21 Oreg. 580, 28 Pac. Rep. 901; *Robinson v. Doss*, 53 Tex. 496.

<sup>4</sup> *Wilson v. Hildreth*, 118 Mass. 578; *Lincoln v. Edgecomb*, 28 Me. 275; *Den v. Graham*, 1 Dev. & B. 76, 27 Am. Dec. 226; *Boydston v. Sumpter*, 78 Tex. 402, 14 S. W. Rep. 996; *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. Rep. 256; *Fagan v. Stoner*, 67 Tex. 286, 3 S. W. Rep. 44; *Booth v. Strippleman*, 26 Tex. 436; *Rand v. Cartwright*, 82 Tex. 399, 18 S. W. Rep. 794; *Talkin v. Anderson* (Tex.), 19 S. W. Rep. 350; *Gregg v. Hill*, 82 Tex. 405, 17 S. W. Rep. 838.

<sup>5</sup> *Chinoweth v. Haskell*, 3 Pet. 92, 96.

<sup>6</sup> *Danziger v. Boyd*, 21 J. & S. 398,

Where the starting-point in a description is known, or ascertained by a survey, but at the time of making the deed the parties placed a monument in another place as the starting-point, this must yield to the survey and the requirements of the description given.<sup>1</sup>

The metes and bounds in a description prevail in a conveyance of the land "with the buildings thereon," though one of the buildings extends five feet over upon other land of the grantor; the deed does not convey the strip of land covered by the building, or any easement therein.<sup>2</sup>

But all the calls for monuments must be satisfied if this is reasonably possible.<sup>3</sup>

385. When a monument is named as the point of beginning, words descriptive of the locality do not control, except as indicating the general locality of the monument.<sup>4</sup> Thus in a grant "beginning on the side of Gallon Creek, at a small oak, John Edward's corner," the side of the creek is merely a description of the locality. The true point of beginning is the small oak.<sup>5</sup>

The starting call of a description, being more important than any other call, usually controls any other call with which it is in conflict, for it is supposed that a mistake in regard to that is less likely to occur.<sup>6</sup> But when the succeeding calls are as readily ascertained, and are as little liable to mistake, they are of equal dignity with the first; and when all the subsequent calls conflict with the first, and agree with each other, their united testimony controls the point of beginning.<sup>7</sup>

409; *Baldwin v. Brown*, 16 N. Y. 359; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Townsend v. Hayt*, 51 N. Y. 656; *Bufalo, N. Y. & Erie R. Co. v. Stigeler*, 61 N. Y. 348; *Booth v. Upshur*, 26 Tex. 64, 71; *Booth v. Strippleman*, 26 Tex. 436, 441; *Doe v. Vallejo*, 29 Cal. 385.

<sup>1</sup> *Parkinson v. McQuaid*, 54 Wis. 473, 11 N. W. Rep. 682.

<sup>2</sup> *Griffiths v. Morrison*, 106 N. Y. 165, 12 N. E. Rep. 580. See, also, *Old South Soc. v. Wainwright*, 141 Mass. 443, 5 N. E. Rep. 843.

<sup>3</sup> *Miller v. Bryan*, 86 N. C. 167; *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321.

<sup>4</sup> *Cleveland v. Smith*, 2 Story, 278; *Murray v. Spencer*, 88 N. C. 357.

<sup>5</sup> *Bonaparte v. Carter*, 106 N. C. 534, 11 S. E. Rep. 262; *Wilson v. Inloes*, 6 Gill, 121.

<sup>6</sup> *Hord v. Olivari (Tex.)*, 5 S. W. Rep. 57.

<sup>7</sup> *Stevenson v. Erskine*, 99 Mass. 367; *Walsh v. Hill*, 38 Cal. 481; *Hughes v. Cawthorn*, 35 Fed. Rep. 248; *Harry v. Graham*, 1 Dev. & B. 76, 79, 47 Am. Rep. 226; *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. Rep. 349; *Cowles v. Reavis*, 109 N. C. 417, 13 S. E. Rep. 930; *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. Rep.



**386. Natural and artificial monuments.** — Some of the natural objects referred to in deeds as monuments are streams, rivers, ponds, lakes, shores, beaches, rocks, highways, streets, trees, and hills.<sup>1</sup> Such natural objects serve the same purpose as artificial monuments, and are better because more permanent and more readily ascertained. A call for "the hills" might in many cases be too indefinite a monument; but if there is a studied repetition of this call in several deeds, effect must be given to it, and it will prevail over a call for distance.<sup>2</sup>

Artificial monuments are more readily disregarded than natural monuments in favor of other modes of description.<sup>3</sup> Thus, when it is apparent from the designation of quantity or other elements of description that the courses and distances given are correct, an artificial monument is readily discarded in favor of the description by courses and distances.<sup>4</sup>

The general rule applies, however, to artificial monuments, though these are less certain than natural monuments.<sup>5</sup> A deed of a house and lot in a row or block of houses described the side lines as being "eighty feet, or a fraction more or less." The grantor owned the land only to the depth of about sixty-five feet from the front; and extrinsic evidence showed that at the time of the conveyance a fence ran along the rear of the block of houses at that depth from the front. It was held that the fence formed a visible boundary and controlled the distance as expressed in the deed, and consequently there was no breach of the covenant of ownership.<sup>6</sup>

161; *Lancaster v. Ayers* (Tex.), 12 S. W. Rep. 163.

<sup>1</sup> *Travellers' Insurance Co. v. Yount*, 98 Ind. 454; *Myers v. St. Louis*, 82 Mo. 367; *Bellows v. Jewell*, 60 N. H. 420; *Winthrop v. Curtis*, 3 Me. 110, 14 Am. Dec. 216.

<sup>2</sup> *Clamorgan v. Baden & St. L. Ry.* Co. 72 Mo. 139; *Clamorgan v. Hornsby*, 94 Mo. 83, 6 S. W. Rep. 651, 13 Mo. App. 550.

<sup>3</sup> *Ayers v. Watson*, 113 U. S. 594, 5 S. Ct. Rep. 641; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150; *Wyckoff v. Stephenson*, 14 Ohio, 13; *Fulwood v. Graham*, 1 Rich. 491; *Reed v. Shenck*, 3 Dev. 65.

<sup>4</sup> *Baldwin v. Brown*, 16 N. Y. 359.

<sup>5</sup> *Ayers v. Watson*, 113 U. S. 594, 5 S. Ct. Rep. 641.

<sup>6</sup> *Smith v. Negbauer*, 42 N. J. L. 305, 307. "The expression 'house and lot,' used in reference to premises in a city, ordinarily imports a house with a curtilage, shut off from the neighboring grounds by some physical objects. Thus the deed bears upon its face intimation that the land to be conveyed by it is inclosed within visible boundaries, and, although the character of these boundaries be not indicated in the instrument, nevertheless the law permits extrinsic evidence of the actual condition of things for the purpose of ascertaining the situation of the land." Per Dixon, J.

Monuments erected by the parties immediately after a conveyance have the same effect as if they had been in existence at the time of the conveyance.<sup>1</sup> If the monuments themselves have disappeared, the positions where they were placed may be shown, and, when established with reasonable certainty by evidence, they govern, just as the monuments themselves, had they been found, would govern.<sup>2</sup>

A boundary upon a river is a monument which controls courses and distances, as well as the corners and meander lines of a survey.<sup>3</sup> A ditch is spoken of as a natural monument.<sup>4</sup> Highways, fences, and walls are regarded as artificial monuments when referred to in deeds, and the land conveyed abuts upon them.<sup>5</sup>

If a fence or wall on or near a boundary line is not called for or mentioned in a deed, there is no presumption that it was or was not intended for a line. Any inference from the fact is for the jury.<sup>6</sup>

**387. When different and conflicting monuments are given,** that which is the most substantial, the most clearly identified, and most certain to be that with reference to which the parties contracted, must be regarded as controlling.<sup>7</sup> The owner of a large tract of land, divided into lots for houses, sold a lot with a house built upon it, bounding it, beginning at a fence two hundred and thirty feet distant, and thence by a line running around the lot, the courses and distances of which were given. One of

<sup>1</sup> *Blaney v. Rice*, 20 Pick. 62, 32 Am. Dec. 204; *Davis v. Rainsford*, 17 Mass. 207, 212; *Waterman v. Johnson*, 13 Pick. 261, 267; *Kennebec Purchase v. Tiffany*, 1 Me. 219, 10 Am. Dec. 60; *Fleischfresser v. Schmidt*, 41 Wis. 223.

<sup>2</sup> *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. Rep. 147; *Yanish v. Tarbox*, 49 Minn. 268, 51 N. W. Rep. 1051; *Benton v. Horsley*, 71 Ga. 619; *West v. Shaw*, 67 N. C. 483; *Buford v. Gray*, 51 Tex. 331.

<sup>3</sup> *Hartshorn v. Wright*, 1 Pet. C. C. 64; *Davis v. Rainsford*, 17 Mass. 207; *Sphung v. Moore*, 120 Ind. 352, 22 N. E. Rep. 319; *Shelton v. Maupin*, 16 Mo. 124; *Galveston County v. Tankersley*, 39 Tex. 651.

<sup>4</sup> *Greenleaf v. Brooklyn, &c. Ry. Co.* 3 N. Y. Supp. 222, 8 N. Y. Supp. 30.

<sup>5</sup> *Henderson v. Hatterman*, 146 Ill. 555, 34 N. E. Rep. 1041; *Canal Trustees v. Haven*, 11 Ill. 554; *Morgan v. Givens* (Ky.), 19 S. W. Rep. 582.

<sup>6</sup> *Blackington v. Sumner*, 69 Me. 136.

<sup>7</sup> *Sanborn v. Rice*, 129 Mass. 387; *Hubbard v. Dusy*, 80 Cal. 281, 22 Pac. Rep. 214; *Robertson v. Mooney*, 1 Tex. Civ. App. 379, 21 S. W. Rep. 143; *New York Land Co. v. Votaw*, 150 U. S. 24, 14 Sup. Ct. Rep. 1; *Zeibold v. Foster*, 118 Mo. 349, 24 S. W. Rep. 155. In cases where the known and fixed monuments do not agree with each other, the court must of necessity decide them. *Fitzgerald v. Brennan*, 57 Conn. 511, 18 Atl. Rep. 743; *Harrell v. Morris* (Tex.), 5 S. W. Rep. 625; *Roberts v. Helm*, 1 Tex. Civ. App. 100, 20 S. W. Rep. 1004.

the conditions of the conveyance was that the house should occupy the entire width of the lot, and it was recited that the house then upon the lot was in compliance with the conditions named. Afterwards the owner sold the adjoining house and lot by a deed containing a similar description. It was held that the centre of the partition wall between the two houses was the true boundary, although the effect of measuring from the fence referred to would be to place the whole of the partition wall on the lot last sold. The house itself was the controlling monument rather than the distant fence.<sup>1</sup> Where there are two conflicting monuments, one of which corresponds with the courses and distances, that one should be taken, and the other rejected as surplusage.<sup>2</sup>

When there is conflicting evidence as to natural objects named in running the lines, this is not to be put wholly out of view; but if the jury, after considering such evidence, are left in doubt, they will be justified in locating the land by referring to such natural objects mentioned as are certain.<sup>3</sup>

**388. A description by well-ascertained monuments prevails over a description by reference to the limits of the lands of adjacent owners.**<sup>4</sup> If a boundary be by the line of a railroad, the line of the railroad becomes a monument and controls the boundary, instead of a line running "to a stake and stones;"<sup>5</sup> if the railroad is then located, but not built, a subsequent change of location does not affect the boundary.<sup>6</sup>

If there are no monuments or marks upon the ground, a call for the adjoining lands prevails in case there is any discrepancy between such call and the courses and distances given.<sup>7</sup> The

<sup>1</sup> *Sanborn v. Rice*, 129 Mass. 387.

<sup>2</sup> *Zeibold v. Foster*, 118 Mo. 349, 24 S. W. Rep. 155; *Jamison v. Fopiano*, 48 Mo. 194.

<sup>3</sup> *New York Land Co. v. Votaw*, 150 U. S. 24, 14 Sup. Ct. Rep. 1.

<sup>4</sup> *Benedict v. Gaylord*, 11 Conn. 332, 29 Am. Dec. 299; *Clement v. Bank of Rutland*, 61 Vt. 298, 17 Atl. Rep. 717; *Smith v. Headrick*, 93 N. C. 210; *Thomas v. Godfrey*, 3 Gill & J. 142, 147; *Spreckles v. Ord*, 72 Cal. 86.

<sup>5</sup> *Church v. Stiles*, 59 Vt. 642, 10 Atl. Rep. 674; *Miller v. Beeler*, 25 Ill. 163. A boundary by a railroad would ordina-

rily be by the right of way of the road; but a boundary by the "railroad track," before any definite right of way had been secured, is a boundary by the track. *Reid v. Klein* (Ind.), 37 N. E. Rep. 967. And see *Williams v. Savannah, &c. Ry. Co.* (Ga.) 20 S. E. Rep. 487.

<sup>6</sup> *King v. Norfolk & W. R. Co.* (Va.) 17 S. E. Rep. 868.

<sup>7</sup> *Clamorgan v. Hornsby*, 94 Mo. 83, 6 S. W. Rep. 651; *Stroup v. McCloskey* (Pa.), 10 Atl. Rep. 421, 481; *Hogans v. Carruth*, 19 Fla. 84; *Roane Co. v. Anderson Co.* 89 Tenn. 259, 14 S. W. Rep. 1079; *Cunningham v. Curtis*, 57 N. H. 157.

adjoining land in that case becomes a monument which controls courses and distances.<sup>1</sup> The length of the boundary line upon adjoining land is that named in the deed, if the distance is given.<sup>2</sup>

When a boundary is "by land of" another, the phrase means land belonging to him, and does not include land in which he has simply an easement,<sup>3</sup> such as a right of way, and does not include land occupied by him without having the title.<sup>4</sup> The true line of the ownership of the adjoining land is the monument, rather than the line marked by possession,<sup>5</sup> or that which the parties supposed was the line at the time the deed was executed;<sup>6</sup> or that which the adjoining owner had contracted to purchase, and had paid the price for, and was occupying as his own, but had received no conveyance of.<sup>7</sup> If the line of the land of the

<sup>1</sup> *Land Co. v. Saunders*, 103 U. S. 316; *Bryant v. Maine Cent. R. Co.* 79 Me. 312, 9 Atl. Rep. 736; *Church v. Stiles*, 59 Vt. 642, 10 Atl. Rep. 674; *Graybeal v. Powers*, 76 N. C. 66; *Howell v. Merrill*, 30 Mich. 282; *Smith v. Headrick*, 93 N. C. 210; *Buckner v. Anderson*, 111 N. C. 572, 16 S. E. Rep. 424; *Smith v. Catlin Land Co.* 117 Mo. 438, 22 S. W. Rep. 1083; *Whittlesey v. Kellogg*, 28 Mo. 404; *Win-nipisiogee Paper Co. v. N. H. Land Co.* 59 Fed. Rep. 542. In the last case, a line was described as running south to the "north-west corner of Burton; thence westerly along the northern line of Waterville," both parties assuming that the north-east corner of Waterville is at the north-west corner of Burton, but it afterwards turns out that the Waterville corner and north line are a substantial distance farther south: the grant only goes to the Burton corner, and the southern boundary must be run westerly therefrom, and parallel with the north line of Waterville, thus excluding the intervening territory. *Land Co. v. Saunders*, 103 U. S. 316, distinguished; *Cox v. McGowan* (N. C.), 21 S. E. Rep. 108.

<sup>2</sup> *Thomasson v. Hanna* (Ky.), 18 S. W. Rep. 227.

<sup>3</sup> *Segar v. Babcock*, 18 R. I. 188, 26 Atl. Rep. 257.

<sup>4</sup> *Crosby v. Parker*, 4 Mass. 110; *Cornell v. Jackson*, 9 Metc. 150; *Cleveland v. Flagg*, 4 Cush. 76; *Sparhawk v. Bagg*, 16 Gray, 583. In *Cleveland v. Flagg* a fence had been erected on what was supposed to be a dividing line. But Shaw, C. J., said: "Here no fence was alluded to in the deed as a monument. The fence was not set up with a view to make it a monument, and there was no uncertainty respecting the true line. It appears quite certain that H [the grantor] owned up to B's true line, notwithstanding the fence, and, if he did, we think it is beyond doubt that he intended to convey it; indeed, such is the direct effect of the words in his deed." In *Jewett v. Hussey*, 70 Me. 433, the same rule is followed, upon the ground that it is safer to adhere to the line marked by ownership than to the line marked by possession, which is an indefinite guide. See, also, *Powers v. Jackson*, 50 Cal. 429.

<sup>5</sup> *Cornell v. Jackson*, 9 Met. 150; *Jewett v. Hussey*, 70 Me. 433; *Howell v. Merrill*, 30 Mich. 282; *Umbarger v. Chaboya*, 49 Cal. 525; *Kellogg v. Mullen*, 45 Mo. 571. See *Matlack v. Hogue*, 13 Pa. Co. Ct. 214.

<sup>6</sup> *Umbarger v. Chaboya*, 49 Cal. 256.

<sup>7</sup> *Crosby v. Parker*, 4 Mass. 110; *Cornell v. Jackson*, 9 Met. 150.

adjoining owner, or a corner of his land referred to, has not been determined, the line or corner is wherever it may be finally located.<sup>1</sup> If a mistake be made in the name of an owner of adjoining land, as where the name given is that of the owner's agent instead of the owner himself, this fact may be shown, and the boundary is sufficiently identified.<sup>2</sup>

**389. Lines actually run and marked upon the ground control calls for natural or other fixed boundaries, and calls for adjoining boundaries and for courses and distances.**<sup>3</sup> If the stakes and monuments set at the corners of the parcel in making the survey have disappeared, it is competent to show their location by parol evidence.<sup>4</sup> It is presumed that a line in a call from one monument to another is a straight line;<sup>5</sup> but this is rebutted when the language of the deed shows that a different line was in-

<sup>1</sup> *Edson v. Knox*, 8 Wash. 642, 36 Pac. Rep. 698; *Bailey v. White*, 41 N. H. 337.

<sup>2</sup> *McKeon v. Millard*, 47 Cal. 581.

<sup>3</sup> *Burkholder v. Markley*, 98 Pa. St. 37; *Craft v. Yeane*, 66 Pa. St. 210; *Clary v. McGlynn*, 46 Vt. 347; *Baxter v. Wilson*, 95 N. C. 137; *Adams v. Alkire*, 20 W. Va. 480; *Browning v. Atkinson*, 37 Tex. 633; *Fitch v. Boyer*, 51 Tex. 336; *Riley v. Griffin*, 16 Ga. 141; *Moore v. Whitcomb* (Tex.), 4 S. W. Rep. 373; *Duff v. Moore*, 68 Tex. 270, 4 S. W. Rep. 530; *Titterton v. Trees*, 78 Tex. 567, 14 S. W. Rep. 692; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150; *Watrous v. Morrison*, 33 Fla. 261, 14 So. Rep. 805; *King v. Brigham*, 19 Oreg. 560, 25 Pac. Rep. 150; *Raymond v. Coffey*, 5 Oreg. 132; *Goodman v. Myrick*, 5 Oreg. 65; *Lewis v. Lewis*, 4 Oreg. 209; *Hanson v. Red Rock* (S. D.), 57 N. W. Rep. 11; *Pruner v. Bisbin*, 98 Pa. St. 202; *Younkin v. Cowan*, 34 Pa. St. 198; *Darrah v. Bryant*, 56 Pa. St. 69; *Wharton v. Gavin*, 34 Pa. St. 340; *Watson v. Jones*, 85 Pa. St. 117. Even an unmarked line of one survey, but which can be otherwise identified and its true locality established, when called for as one of the intended boundaries of another survey, will prevail over the call for distance when there is a conflict in the

two calls. *Maddox v. Fenner*, 79 Tex. 279, 15 S. W. Rep. 237; *Fordtran v. Ellis*, 58 Tex. 245; *Moore v. Reiley*, 68 Tex. 668, 5 S. W. Rep. 618; *Blaisdell v. Bissell*, 6 Pa. St. 258, 259. In this case *Gibson, C. J.*, said: "The calls of a survey, and not its courses and distances, are to govern; and where there are actual lines of demarcation, the compass and chain are no more than instruments to point them out. Where they are not to be found, the results obtained by actual survey are the next best evidence of their location. The mischiefs of a system adopted in an adjoining State, where courses and distances are everything and landmarks nothing, have induced us to cling to our own in all cases. Carelessness of chain-carriers, roughness of surface, variation of the compass, imperfection of the instrument, unskilfulness in the use of it, and other causes not to be enumerated, inevitably produce, in every instance, more or less uncertainty of result; and, if we suffered ourselves to be governed by the compass and by measurement, collisions would be incessant."

<sup>4</sup> *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. Rep. 147.

<sup>5</sup> *McCoy v. Galloway*, 3 Ohio, 282, 17 Am. Dec. 591; *Smith v. Davis*, 4 Gratt. 50.

tended.<sup>1</sup> When a line was actually run and marked and corners made, and the marks and corners can be found, the line will control, although the deed calls for a natural object not reached by such line.<sup>2</sup> It is only when the marked lines can be identified on the ground that they will control a call for course and distance.<sup>3</sup> A call for course and distance will control a call for an unmarked line which cannot itself be ascertained except by running the boundaries of another survey according to course and distance.<sup>4</sup>

**390. Corners marked by stakes control courses and distances.** Although stakes are monuments liable to be displaced or removed, they control so long as it is certain that they mark the corners of the original survey.<sup>5</sup>

If a line in the description of land in a deed is given as running a certain distance to a stake and stones, and no such monument exists, the end of the line, in the absence of evidence showing a contrary intent, is to be determined by the measurement.<sup>6</sup>

In case there is no error or inconsistency in the boundaries described in a deed until the last line is reached, which is declared to run a given course and distance "to the place of beginning," but the given course and distance would not bring it to that point, nor complete the inclosure of any land, the course and distance of the last line should be rejected as erroneous, and effect be given to the more certain designation, "thence to the place of beginning."<sup>7</sup>

**391. A course or line given in a deed is presumably a**

<sup>1</sup> *Pratt v. Woodward*, 32 Cal. 219, 91 Am. Dec. 573; *Thornberry v. Churchill*, 4 T. B. Mon. 29, 16 Am. Dec. 125.

<sup>2</sup> *Baxter v. Wilson*, 95 N. C. 137; *Hedge v. Sims*, 29 Ind. 574; *Maguire v. Sturtevant*, 140 Mass. 258, 5 N. E. Rep. 644.

<sup>3</sup> *Darrah v. Bryant*, 56 Pa. St. 69; *Mathers v. Hegarty*, 37 Pa. St. 64; *Quinn v. Heart*, 43 Pa. St. 337; *Fagan v. Stoner*, 67 Tex. 286, 3 S. W. Rep. 44; *Browning v. Atkinson*, 37 Tex. 633; *Duff v. Moore*, 68 Tex. 270; *Moore v. Whitcomb* (Tex.), 4 S. W. Rep. 373; *Ratliff v. Burleson* (Tex. Civ. App.), 25 S. W. Rep. 983; *Boydston v. Sumpter*, 78 Tex. 402, 14 S. W. Rep. 996; *Reed v. Marsh*, 8 Ohio, 147.

<sup>4</sup> *Johnson v. Archibald*, 78 Tex. 96, 14 S. W. Rep. 266; *Robertson v. Mooney* (Tex. Civ. App.), 21 S. W. Rep. 143; *McAninch v. Freeman*, 69 Tex. 445, 4 S. W. Rep. 369; *Baker v. Light*, 80 Tex. 627, 16 S. W. Rep. 330; *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. Rep. 256; *Duff v. Moore*, 68 Tex. 270, 4 S. W. Rep. 530; *Davidson v. Killen*, 68 Tex. 406, 4 S. W. Rep. 561.

<sup>5</sup> *Jones v. Poundstone*, 102 Mo. 240, 14 S. W. Rep. 824.

<sup>6</sup> *Wilson v. Hildreth*, 118 Mass. 578; *Lincoln v. Edgecomb*, 28 Me. 275; *Meade v. Land Co.* (Tex. Civ. App.) 22 S. W. Rep. 298.

<sup>7</sup> *Owings v. Freeman*, 48 Minn. 483, 51 N. W. Rep. 477.

straight line;<sup>1</sup> but this presumption does not hold when there is anything to show that the course is to be determined by a fixed monument, such as a wall; and even a line extending beyond the line of such wall may be deflected from a straight line in order to conform to the distance given for the next boundary line.<sup>2</sup> A line should if possible be construed to be a continuous line.<sup>3</sup>

392. A call for another and older survey will be taken to be the correct boundary, and the location will extend to such survey when no material excess of land is shown.<sup>4</sup>

A call for another survey definitely located is properly ignored where, if followed, it necessitates a total disregard of course and distance, and causes the remaining bounds to conflict with other surveys, and to make the quantity of land very different from that called for.<sup>5</sup>

393. A line defined by monuments usually runs to the centre of such monuments, unless the monuments be structures such as a house, which ordinarily includes the land it stands upon.<sup>6</sup> Mr. Justice Gray, after referring to the rule that a boundary by a way passes the title to the middle of the way, and that a boundary by a river above tide-water passes the fee in the soil to the thread of the river, unless there is some expression of a contrary intention, states the general rule of construction thus:<sup>7</sup> "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used

<sup>1</sup> *Henshaw v. Mullens*, 121 Mass. 143; *Jenks v. Morgan*, 6 Gray, 448; *Dickson v. Wilson*, 82 N. C. 487; *Rains v. Rains* (Ky.), 20 S. W. Rep. 1099.

<sup>2</sup> *Ladies' Friend Soc. v. Halstead*, 58 Conn. 144, 19 Atl. Rep. 658; *Kingsland v. Chittenden*, 6 Lans. 15; *Seneca Nation v. Hugaboom*, 132 N. Y. 492, 30 N. E. Rep. 983; *Long v. Long*, 73 N. C. 370; *Dickson v. Wilson*, 82 N. C. 487.

<sup>3</sup> *Gallatin Turnpike Co. v. State*, 16 Lea, 36; *Grand Co. v. Larimer Co.* 9 Colo. 268.

<sup>4</sup> *Moore v. Reiley*, 68 Tex. 668, 5 S. W. Rep. 618.

<sup>5</sup> *Gregg v. Hill*, 82 Tex. 405, 17 S. W. Rep. 838; *Boon v. Hunter*, 62 Tex. 582; *Duff v. Moore*, 68 Tex. 270, 4 S. W. Rep. 530; *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. Rep. 256; *Freeman v. Mahoney*, 57 Tex. 621.

<sup>6</sup> *White's Bank v. Nichols*, 64 N. Y. 65, 71, per Allen, J.

<sup>7</sup> *Boston v. Richardson*, 13 Allen, 146. And see *Stewart v. Patrick*, 68 N. Y. 450.

in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the centre of the thing so running over or standing on the land is the boundary of the lot granted."

394. When a boundary is by a building, whether the boundary line is wholly outside of every portion of the building is a question upon which there is a conflict of authority. Thus in one case, where a deed described one of the boundaries of the land as four feet from the "northerly side" of a building, the boundary was held to be four feet from the extremest part of the building, which in that case was the edge of the eaves.<sup>1</sup> But in another case, where a deed described one of the boundaries as eight feet four inches from the "south side" of a building, another court held that measurement should be made from the corner-board on the side of the building.<sup>2</sup>

The decision first stated seems to be the better one in the case of a boundary by a building. The parties may well be presumed to intend that the boundary line shall be wholly on one side of every portion of the building; for it would be unreasonable to assume that the parties to the conveyance intended that the main portion of the building should be on one side of the line, and the cornices, and other projecting finish, on the other.<sup>3</sup> This inference, however, may be controlled by other expressions in the deed, or rebutted by competent evidence showing a practical location by the parties, or working an estoppel of the plaintiff.<sup>4</sup>

But however this may be, in the case of a right of way, even if created by express grant, it is not an unreasonable presumption that such way was intended to extend under the projecting finish of a building.<sup>5</sup>

<sup>1</sup> *Millett v. Fowle*, 8 Cush. 150. To like effect, *Meeks v. Willard* (N. J.), 29 Atl. Rep. 318.

<sup>2</sup> *Calais v. Bradford*, 51 Me. 414.

<sup>3</sup> *Farnsworth v. Rockland*, 83 Me. 508, 22 Atl. Rep. 394, per Walton, J.; *Meeks v. Willard* (N. J.), 29 Atl. Rep. 318.

Where the bound of a way was described as running from a certain point

"on a straight line to the shop," it was held that the line ran to the corner of a platform which was a part of the building, either permanent or temporary. *Dunham v. Gannett*, 126 Mass. 151.

<sup>4</sup> *Meeks v. Willard* (N. J.), 29 Atl. Rep. 318.

<sup>5</sup> *Farnsworth v. Rockland*, 83 Me. 508, 22 Atl. Rep. 394. Walton, J., said: "Not



**395. The angle of a boundary line will control as against a measurement** of another boundary line, when it appears to have been the intention of the parties to make the angle a controlling consideration. Thus, if a boundary line is described as running at a right angle to a street, this determines the shape of the lot, though this makes the area of the lot, and the measurement of it on the street, much more than the area and measurement expressed in the deed, these being given with the qualification of the words "more or less."<sup>1</sup>

It is sometimes said that courses control measurements. This can hardly be given as a rule. When there is a discrepancy between a course and distance, one or the other is preferred, according to circumstances.<sup>2</sup>

A deed describing a line as running at right angles to a creek or other stream of water is not on its face void for uncertainty, in the absence of anything to show that the creek does not run in a straight course, or that a straight line drawn along the thread of the stream would not intersect the beginning point. A perpendicular line drawn from this base line would answer the call in the deed.<sup>3</sup> A call in a deed for a line running from a street at right angles thereto is not varied because the next call is for a distance of thirty feet, more or less, from the end of the line to a monument, when in fact the end of the line run at right angles is thirty-three feet and six inches from the monument.<sup>4</sup> Where a boundary line is to run to an extended line, such as a river, a swamp, or the line of another tract of land, such line must run to the nearest point on such river, swamp, or line of another tract; and in carrying out this rule, even a call for a course and distance

only cornices, but small balconies and bay-windows, often overhang sidewalks; and, if they do not in any way interfere with or incommode the public travel, such structures are not unlawful. The owner of land over which a public way passes has a right to occupy the land above and below its surface to any extent that will not impair its usefulness for a way. Of course a bay-window, or a balcony, or a cornice even, may be so low down, and project so far into a street, as to obstruct or incommode the public travel; and in

such a case the structure would be a public nuisance, and its removal could be compelled."

<sup>1</sup> Hall v. Eaton, 139 Mass. 217, 29 N. E. Rep. 660; Noble v. Googins, 99 Mass. 231.

<sup>2</sup> Preston v. Bowmar, 6 Wheat. 580, per Story, J.

<sup>3</sup> Irwin v. Towne, 42 Cal. 326; Hicks v. Coleman, 25 Cal. 122, 143, 85 Am. Dec. 103.

<sup>4</sup> Platt v. Bente, 49 N. J. L. 679, 10 Atl. Rep. 283.

will be disregarded.<sup>1</sup> The course of a line beginning at a street or any other extended boundary line is presumed to be at a right angle to the street when the angle is not specified.

**396. Parallel lines** are strictly and usually straight lines; but sometimes lines which are not straight are so designated.<sup>2</sup> Thus a line may be described as parallel to a winding river.

**397. The terms "north," "south," "east," and "west," or "northerly," "southerly," "easterly," and "westerly,"** when not controlled by definite courses, monuments, or other definite descriptions, mean due north, south, east, or west.<sup>3</sup> But these and similar terms must always yield to monuments and other definite calls.<sup>4</sup> Thus the word "northerly" in the description in a deed, where there is no object to direct its course, must be taken to mean due north; but when there are monuments to which it is applicable, it may have its legitimate meaning and full force, and yet the course may incline either way any distance, provided it tends towards the north.<sup>5</sup>

**398. Estimates of quantity** are usually subordinate both to monuments and to courses and distances, unless it appears that the intention of the parties was that an exact quantity of land should be granted. A statement of the quantity, in the absence of an express covenant that the land conveyed contains that quantity, has very little weight when the deed contains an accurate description by permanent boundaries capable of being ascertained.<sup>6</sup> This is particularly the case where the words "more or

<sup>1</sup> *Allen v. Sallinger*, 108 N. C. 159, 12 S. E. Rep. 896; *Austrian v. Davidson*, 21 Minn. 117.

<sup>2</sup> *Fratt v. Woodward*, 32 Cal. 219, 91 Am. Dec. 573; *Hicks v. Coleman*, 25 Cal. 122, 143, 85 Am. Dec. 103.

<sup>3</sup> *Brandt v. Ogden*, 1 Johns. 156; *Jackson v. Reeves*, 3 Caines, 293; *Fratt v. Woodward*, 32 Cal. 219, 91 Am. Dec. 573; *Bosworth v. Danzien*, 25 Cal. 296; *Faris v. Phelan*, 39 Cal. 612; *Irwin v. Towne*, 42 Cal. 326, 334; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. Rep. 491; *Currier v. Nelson*, 96 Cal. 505, 31 Pac. Rep. 531; *Reed v. Tacoma Build. Asso.* 2 Wash. 198, 26 Pac. Rep. 252.

<sup>4</sup> *Irwin v. Towne*, 42 Cal. 326; *Moss v. Shear*, 30 Cal. 467.

<sup>5</sup> *Foster v. Foss*, 77 Me. 279; *Segar v. Babcock*, 18 R. I. 188, 26 Atl. Rep. 257; *Garvin v. Dean*, 115 Mass. 577; *Cunningham v. Curtis*, 57 N. H. 157; *Brandt v. Ogden*, 1 Johns. 156.

<sup>6</sup> *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Jackson v. Sprague*, 1 Paine, 494; *Field v. Columbet*, 4 Sawyer, 523; *Ayers v. Watson*, 113 U. S. 594, 5 S. Ct. Rep. 641. **Alabama:** *Hess v. Cheney*, 83 Ala. 251, 3 So. Rep. 791; *Rogers v. Peebles*, 72 Ala. 529; *Wright v. Wright*, 34 Ala. 194. **Arkansas:** *Phillips v. Porter*, 3 Ark. 18, 36 Am. Dec. 448. **California:** *Winans v. Cheney*, 55 Cal. 567; *Stanley v. Green*, 12 Cal. 148. **Connecticut:** *Belden v. Seymour*, 8 Conn. 19; *Snow v. Chapman*, 1 Root, 528; *Nichols v. Turney*, 15 Conn.

less" are added.<sup>1</sup> The quantity is the least part of the description, and must yield to the description by boundaries.

Parol evidence is not admissible to determine whether the words relating to quantity are descriptive merely, or are used as a warranty of quantity. The meaning of the words used must be sought in the deed and not elsewhere.<sup>2</sup> The deed may even make quantity the controlling element in the description, as where a deed, after describing the land by courses and distances, declared that "said tract shall contain just one acre, and the distances shall be so construed."<sup>3</sup>

**399.** But when the boundaries of a parcel are definite, a statement of the quantity of the land does not generally have

101. **Delaware**: *Dale v. Smith*, 1 Del. Ch. 1, 12 Am. Dec. 64. **Florida**: *Andreu v. Watkins*, 26 Fla. 390, 7 So. Rep. 876. **Georgia**: *Benton v. Horsley*, 71 Ga. 619; *Harris v. Hull*, 70 Ga. 831. **Illinois**: *Stevens v. Wait*, 112 Ill. 544; *Cottingham v. Parr*, 93 Ill. 233; *Wadhams v. Swan*, 109 Ill. 46. **Iowa**: *Ufford v. Wilkins*, 33 Iowa, 110. **Kansas**: *Armstrong v. Brownfield*, 32 Kans. 116, 4 Pac. Rep. 185. **Maine**: *Clark v. Scammon*, 62 Me. 47; *Allen v. Allen*, 14 Me. 387; *Chandler v. McCard*, 38 Me. 564. **Maryland**: *Hall v. Mayhew*, 15 Md. 551. **Massachusetts**: *Powell v. Clark*, 5 Mass. 355, 4 Am. Dec. 67. **Michigan**: *Moran v. Lezotte*, 54 Mich. 83, 88, 19 N. W. Rep. 757, per Cooley, C. J. **Minnesota**: *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. Rep. 147. **Missouri**: *Baker v. Clay*, 101 Mo. 553, 14 S. W. Rep. 734; *Campbell v. Johnson*, 44 Mo. 247; *Ware v. Johnson*, 66 Mo. 662. **New Jersey**: *Fuller v. Carr*, 33 N. J. L. 157. **New York**: *Case v. Dexter*, 106 N. Y. 548, 13 N. E. Rep. 449; *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. Rep. 615; *Jackson v. McConnell*, 19 Wend. 175; *Jackson v. Moore*, 6 Cow. 706; *Baldwin v. Brown*, 16 N. Y. 359; *Mann v. Pearson*, 2 Johns. 37; *Hathaway v. Power*, 6 Hill, 453. **Oregon**: *Raymond v. Coffrey*, 5 Oreg. 132. **Pennsylvania**: *Large v. Penn*, 6 S. & R. 488. **Rhode Island**: *Doyle v. Mellen*, 15 R. I. 523, 8 Atl. Rep. 709. **South Carolina**: *Furwood*

*v. Graham*, 1 Rich. 491. In *Baynard v. Eddings*, 2 Strob. 374, it is said: "It is seldom that quantity is of much weight in a question of location." In *Gourdin v. Davis*, 2 Rich. 481, O'Neill, J., said: "I deny that quantity has ever been regarded as a certainty in a deed. It is altogether too uncertain a matter to have such an effect." **Tennessee**: *Miller v. Bentley*, 5 Sneed, 671. **Texas**: *Dalton v. Rust*, 22 Tex. 133; *Hatch v. Garza*, 22 Tex. 176; *Hunter v. Morse*, 49 Tex. 219; *Rand v. Cartwright*, 82 Tex. 399, 18 S. W. Rep. 794. **Vermont**: *Grand Trunk Ry. Co. v. Dyer*, 49 Vt. 74. **Wisconsin**: *Bioux v. Cormier*, 75 Wis. 566, 44 N. W. Rep. 654.

<sup>1</sup> *Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. Rep. 809. As far back as 1818, Nott, J., said, in *Executors of Peay v. Briggs*, 2 Mill Const. 98, recognized in the more recent case of *Bratton v. Clawson*, 3 Strob. 127, 130, "that where a person purchases land by metes and bounds, represented to contain a certain number of acres 'more or less,' he is entitled to recover all the lands within the prescribed limits, whatever the number of acres may be. It must be apparent from the words 'more or less' that the metes and bounds are to govern, and not the number of acres."

<sup>2</sup> *Hess v. Cheney*, 83 Ala. 251, 3 So. Rep. 791; *Winston v. Browning*, 61 Ala. 80.

<sup>3</sup> *Sanders v. Godding*, 45 Iowa, 463.

any effect. Such statement is considered merely as descriptive, and, as the quantity is the least certain part of the description, that must yield to the boundaries, or other definite description by name or number, or by map or survey.<sup>1</sup> The most material and particular part of the description controls that which is less natural and certain. It is only in the absence of monuments, courses, and distances that the quantity of land named in the deed will govern.<sup>2</sup>

400. The call for quantity may be resorted to for the purpose of making that certain which otherwise would be uncertain, and especially is this the case when the lands are described by sectional subdivisions.<sup>3</sup> The call for quantity may aid the

<sup>1</sup> *Fuller v. Carr*, 33 N. J. L. 157; *Richwine v. Jones* (Ind.), 39 N. E. Rep. 460; *Silver Creek Cement Co. v. Union Lime Co.* 138 Ind. 297, 35 N. E. Rep. 125; *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. Rep. 615; *Jackson v. McConnell*, 19 Wend. 175; *Jackson v. Moore*, 6 Cow. 706; *Arden v. Thompson*, 5 Cow. 371; *Andrews v. Pearson*, 68 Me. 19; *Borkenhagen v. Vianden*, 82 Wis. 206, 52 N. W. Rep. 260; *Doctor v. Furch*, 76 Wis. 153, 44 N. W. Rep. 648; *Scull v. Pruden*, 92 N. C. 168; *Rogers v. Peebles*, 72 Ala. 529; *Hess v. Cheney*, 83 Ala. 251, 3 So. Rep. 791; *Hunter v. Hume*, 88 Va. 24, 13 S. E. Rep. 305; *Ayers v. Harris*, 77 Tex. 108, 13 S. W. Rep. 768; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. Rep. 880. In *Baker v. Light*, 80 Tex. 627, 16 S. W. Rep. 330, the deed was of "400 acres, more or less, out of the southeast corner" of a certain survey, and described the tract conveyed by metes and bounds, courses and distances. According to the courses and distances, the land conveyed did not reach to the east line of the survey. It was proved that, when the tract conveyed was surveyed, the east line of the survey could not be found, and that the surveyor only established the west corners of the tract. The position of these corners was not disputed. Although there were 400 acres within the courses and distances named in the deed, the deed passed title to all the land between the west cor-

ners of the tract and the east line of the survey.

<sup>2</sup> *Allen v. Kersey*, 104 Ind. 1, 3 N. E. Rep. 557; *Silver Creek Cement Co. v. Union Lime Co.* 138 Ind. 297, 35 N. E. Rep. 125.

<sup>3</sup> *Field v. Columbet*, 4 Sawyer, 523; *Morton v. Root*, 2 Dill. 312; *White v. Luning*, 93 U. S. 514; *Baldwin v. Brown*, 16 N. Y. 359; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Buffalo, New York & Erie R. Co. v. Stigeler*, 61 N. Y. 348; *Davis v. Rainsford*, 17 Mass. 207; *Davis v. Hess*, 103 Mo. 31, 15 S. W. Rep. 324; *Burnett v. McCluey*, 78 Mo. 676; *Prior v. Scott*, 87 Mo. 303; *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. Rep. 551; *Davis v. Rainsford*, 17 Mass. 207; *Hall v. Shotwell*, 66 Cal. 379, 5 Pac. Rep. 683; *Winans v. Cheney*, 55 Cal. 567; *Baxter v. Wilson*, 95 N. C. 137; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103; *Hoffman v. Port Huron* (Mich.), 60 N. W. Rep. 831; *Moran v. Lezotte*, 54 Mich. 83, 19 N. W. Rep. 757; *Kirkland v. Way*, 3 Rich. 4, 45 Am. Dec. 752; *Campbell v. Carruth*, 32 Fla. 264, 13 So. Rep. 432; *Bowen v. Prout*, 52 Ill. 354; *Smiley v. Fries*, 104 Ill. 416; *Pennington v. Flock*, 93 Ind. 378; *Enochs v. Miller*, 60 Miss. 19; *Dorr v. School Dist.* 40 Ark. 237; *Andrews v. Murphy*, 12 Ga. 431; *Jones v. Motley* (Ky.), 13 S. W. Rep. 432; *Hale v. Cottle*, 21 Oreg. 580, 28 Pac. Rep. 901; *Welder v. Hunt*, 34 Tex. 44.

description, but generally has no controlling effect. The call for quantity may serve to show that the courses and distances are right, and that a further description by visible monuments is wrong. Thus, when it is apparent upon the face of a deed that the intention was to convey a specific quantity of lands, and the courses and distances give that precise quantity, but the description by fixed monuments would embrace more or less than that quantity, it is clear that the description by courses and distances should be followed.<sup>1</sup>

When one of the boundaries is uncertain, upon an issue as to the location of one of the lines the jury should be instructed to take into consideration the quantity of land granted; and they should not be instructed that the quantity is immaterial if the boundaries can be fixed in harmony with the calls of the survey.<sup>2</sup>

401. Quantity is sometimes an essential part of the description. Thus, where a deed conveys a given quantity of land, and describes it as bounded on a stream on one side, starting from a point named, and containing a certain number of acres in a square form, all the boundaries may be determined by the quantity given and the location on the stream.<sup>3</sup>

There are numerous cases in which the quantity has been given controlling effect. Each case has been decided upon its own merits; the only general rule being that, if possible, effect shall be given to the intent of the parties, if this can be ascertained.<sup>4</sup> A grant of a mine with one thousand acres of land "around, circumjacent, and adjoining said mine," the grantor owning a larger tract, may according to the California decisions be located in a square form around the mine, taking the mine as the centre of the location.<sup>5</sup>

By statute in some States, sales for the payment of taxes are

<sup>1</sup> *Baldwin v. Brown*, 16 N. Y. 359; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Buffalo, N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348; *Danziger v. Boyd*, 21 J. & S. 398; *McClintock v. Rogers*, 11 Ill. 279.

<sup>2</sup> *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. Rep. 161.

<sup>3</sup> *Hall v. Shotwell*, 66 Cal. 379, 5 Pac. Rep. 683; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103.

<sup>4</sup> *Herrick v. Sixby*, L. R. 1 P. C. 436; *Baldwin v. Brown*, 16 N. Y. 359; *Higin-*

*botham v. Stoddard*, 72 N. Y. 94; *Moran v. Lezotte*, 54 Mich. 83, 19 N. W. Rep. 757; *Bell v. Sawyer*, 32 N. H. 72; *White v. Gay*, 9 N. H. 126, 3 Am. Dec. 224; *Rioux v. Cormier*, 75 Wis. 566, 44 N. W. Rep. 654; *Lipscomb v. Underwood* (Tex. Civ. App.), 27 S. W. Rep. 155; *Slack v. Dawes*, 3 Tex. Civ. App. 520, 22 S. W. Rep. 1053.

<sup>5</sup> *Santa Clara M. Asso. v. Quicksilver M. Co.* 8 Sawyer, 330, 17 Fed. Rep. 657.

made of so much of the land subject to the tax as will suffice to pay the amount of the tax, and the land sold is frequently described as being in a square form in a certain part or corner of the assessed land. Of course the quantity in such case largely controls the description.<sup>1</sup>

402. A grant of a part of a section or lot of land is void when the particular part is not indicated;<sup>2</sup> but a grant of the south part of a subdivision of a government section of land containing a certain number of acres is sufficiently certain, inasmuch as the quantity of land specified may be laid off in a strip of equal depth on the southern boundary of the subdivision named.<sup>3</sup> If the land conveyed be a certain number of acres in a certain corner of a section named, enough land may be selected in such corner, in a square bounded by four equal sides, to satisfy the call for quantity.<sup>4</sup>

A description as "the southeast part of a quarter section containing thirty-two acres" is insufficient, because it is impossible to determine whether the form of the parcel should be a square or some other shape;<sup>5</sup> though there are numerous decisions that such a description is sufficient, as the land is to be laid off in such case in the form of a square.<sup>6</sup> A grant of a hundred acres out of a

<sup>1</sup> *Hansee v. Mead*, 27 Hun, 162.

<sup>2</sup> *Mutual Build. Asso. v. Wyeth* (Ala.), 17 So. Rep. 45; *Wilkinson v. Roper*, 74 Ala. 140; *Adams v. Edgerton*, 48 Ark. 419, 3 S. W. Rep. 628; *Roberts v. Deeds*, 57 Iowa, 320, 10 N. W. Rep. 740; *Collins v. Storm*, 75 Iowa, 36, 39 N. W. Rep. 161; *Moulton v. Egery*, 75 Me. 485; *Tierney v. Brown*, 65 Miss. 563, 5 So. Rep. 104; *Cogburn v. Hunt*, 54 Miss. 675; *Dingey v. Paxton*, 60 Miss. 1038; *Plenny v. Ferrell* (Miss.), 11 So. Rep. 6; *Goodbar v. Dunn*, 61 Miss. 618; *Campbell v. Johnson*, 44 Mo. 247; *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. Rep. 891; *Mizzell v. Ruffin*, 113 N. C. 21, 18 S. E. Rep. 72; *McGlawthorn v. Worthington*, 98 N. C. 199, 3 S. E. Rep. 633; *Overand v. Menczer*, 83 Tex. 122, 18 So. Rep. 301; *Tram Lumber Co. v. Hancock*, 70 Tex. 312, 7 S. W. Rep. 724; *Morse v. Stockman*, 73 Wis. 89, 40 N. W. Rep. 679.

<sup>3</sup> *Tierney v. Brown*, 65 Miss. 563, 5 So.

Rep. 104; *Goodbar v. Dunn*, 61 Miss. 618; *Enochs v. Miller*, 60 Miss. 19; *McCready v. Lansdale*, 58 Miss. 877; *Cox v. Hayes*, 64 Cal. 32, 27 Pac. Rep. 785; *Sonkup v. Union Inv. Co.* 84 Iowa, 448, 51 N. W. Rep. 167; *Watson v. Crutcher*, 56 Ark. 44, 19 S. W. Rep. 98.

<sup>4</sup> *Wilkinson v. Roper*, 74 Ala. 140; *Bybee v. Hageman*, 66 Ill. 519; *Walsh v. Ringer*, 2 Ohio, 327, 15 Am. Dec. 555; *Goodbar v. Dunn*, 61 Miss. 618; *Lego v. Medley*, 79 Wis. 211, 48 N. W. Rep. 375; *Smith v. Nelson*, 110 Mo. 552, 19 S. W. Rep. 734; *McCartney v. Dennison* (Cal.), 35 Pac. Rep. 766.

<sup>5</sup> *Shoemaker v. McMonigle*, 86 Ind. 421; *Buchanan v. Whitham*, 36 Ind. 257; *White v. Hyatt*, 40 Ind. 385. And see *Schattler v. Cassinelli*, 56 Ark. 172, 19 S. W. Rep. 746; *Stewart v. Aten*, 5 Ohio St. 257.

<sup>6</sup> *McCartney v. Dennison* (Cal.), 35 Pac. Rep. 766; *Lovejoy v. Gaskill*, 30

larger tract described, "it being the easternmost portion of the farm," may be located by running a line due north and south intersecting the boundaries of the farm, and including the given area to the east of such line.<sup>1</sup> A grant of "sixteen feet of the north end" of a lot described is not so uncertain as to render the grant void.<sup>2</sup>

**403.** A right given the vendee to select a definite number of acres of land out of a larger tract affords the means of rendering the description certain,<sup>3</sup> but no title passes until the selection is made. The deed itself only gives the right to make the selection, and to enforce a conveyance of the land that may be chosen in the manner provided by the deed.<sup>4</sup>

A deed with a blank description is of course void, but the grantor may authorize his agent to select the land and fill in the description, though, if this be not done in the lifetime of the grantor, the deed is void. If the grantee enters into possession under such a deed, this may be used as evidence of the character of his possession.<sup>5</sup>

A deed of land located by a general description, with a direction that a certain quantity of land so described is to be surveyed by a surveyor designated and the field-notes attached to the deed, is not void for indefiniteness if the survey be made and the field-notes attached as provided.<sup>6</sup>

**404.** A conveyance of a definite quantity of land out of a larger tract well described, but without locating the land thus conveyed, is construed as conveying a proportionate undivided interest in the larger tract, provided the deed does not purport specifically to describe the smaller tract so conveyed, nor attempt to do so with any certainty.<sup>7</sup> But if the deed attempts to de-

Minn. 137, 14 N. W. Rep. 583; *Smith v. Nelson*, 110 Mo. 552, 19 S. W. Rep. 734; *Wilkinson v. Roper*, 74 Ala. 140; *Soukup v. Union Investment Co.* 84 Iowa, 448, 51 N. W. Rep. 167; *Walsh v. Ringer*, 2 Ohio, 327.

<sup>1</sup> *Warren v. Makely*, 85 N. C. 12.

<sup>2</sup> *Vaughn v. Schmalsle*, 10 Mont. 186, 25 Pac. Rep. 102.

<sup>3</sup> *Corbin v. Jackson*, 14 Wend. 619, 28 Am. Dec. 550; *Nye v. Moody*, 70 Tex. 434, 8 S. W. Rep. 606; *Dohoney v. Wo-*

*mack*, 1 Tex. Civ. App. Cas. 354, 20 S. W. Rep. 950.

<sup>4</sup> *Dull v. Blum*, 68 Tex. 299, 4 S. W. Rep. 489.

<sup>5</sup> *Tarrant Co. v. McLemore (Tex.)*, 8 S. W. Rep. 94.

<sup>6</sup> *Nye v. Moody*, 70 Tex. 434, 8 S. W. Rep. 606.

<sup>7</sup> *Gibbs v. Swift*, 12 Cush. 393; *Brown v. Bailey*, 1 Met. 254; *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. Rep. 222, 224; *Schenk v. Evoy*, 24 Cal. 104; *Grogan v. Vache*, 45 Cal. 610; *Lawrence v. Ballou*, 37 Cal.

scribe a specific part of the larger tract, but fails to give sufficient description to convey that part, the deed does not convey any undivided interest in the whole tract, though the quantity intended to be conveyed is given.<sup>1</sup> A deed describing the premises conveyed as being all of a designated tract not conveyed by the grantor to a third party named is insufficient of itself, and without proof as to what part of the tract had not been conveyed to the third person, to show title to any part of such lands in the grantee.<sup>2</sup> But such a deed is rendered certain in its description by showing what part of the whole tract had been conveyed; and said deed is sufficient to convey the remaining land as against a subsequent purchaser for value without notice.<sup>3</sup>

A deed which conveys a certain number of acres on the north side of a lot of land, described by its number, the lot being a square, is sufficiently certain to embrace such a parallelogram as would result from drawing a line across the lot, parallel with its northern boundary, so as to cut off the required quantity.<sup>4</sup>

405. The word "half," when used in describing land, should be construed as meaning "half in quantity," unless the context or surrounding facts and circumstances show a contrary intention. It was so held in a case where two tenants in common of a parcel of land, which could not be equally divided by a north and south line drawn equidistant from its east and west lines, conveyed to each other the "east half" and "west half" respectively of said parcel, containing an equal number of acres, and without reference to the "government survey."<sup>5</sup>

But in government surveys of the public lands the terms "east

518; *Lick v. O'Donnell*, 3 Cal. 60, 58 Am. 76 Am. Dec. 53; *Roth v. Gabbert* (Mo.), Dec. 383; *Wallace v. Miller*, 52 Cal. 655; 27 S. W. Rep. 528.

*Pipkin v. Allen*, 29 Mo. 229; *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 441; <sup>2</sup> *Maier v. Joslin*, 46 Minn. 228, 48 N. W. Rep. 909.

*Jackson v. Livingston*, 7 Wend. 136; *Corbin v. Jackson*, 14 Wend. 619; *Sheafe v. Wait*, 30 Vt. 735; *Dohoney v. Womack*, <sup>3</sup> *Baker v. Clay*, 101 Mo. 553, 14 S. W. Rep. 734.

1 Tex. Civ. App. 354, 19 S. W. Rep. 883, <sup>4</sup> *Gress Lumber Co. v. Coody* (Ga.), 21 S. E. Rep. 217; *Cobb v. Taylor*, 133 Ind. 20 S. W. Rep. 950; *Linnartz v. McCulloch* (Tex. Civ. App.), 27 S. W. Rep. 279; 605, 33 N. E. Rep. 615.

*Slack v. Dawes* (Tex. Civ. App.), 22 S. W. Rep. 1053. <sup>5</sup> *Jones v. Pashby*, 62 Mich. 614, 29 N. W. Rep. 374; *Dart v. Barbour*, 32 Mich. 267; *Au Gres Boom Co. v. Whitney*, 26 Mich. 42; *Farley v. Deslonde*, 69 Tex. 458, 6 S. W. Rep. 786.

<sup>1</sup> *Grogan v. Vache*, 45 Cal. 610; *Dwyre v. Speer* (Tex. Civ. App.), 27 S. W. Rep. 585; *Wofford v. McKinna*, 23 Tex. 36,



half" and "west half" are used, not with reference to quantity, but to a line equidistant from the boundary lines of the parcel subdivided, and those terms have the same signification in patents issued by the government; and this is true because so provided by act of Congress. A deed of the "east half" of a parcel of land "according to the United States survey" is definite, and excludes the idea of two equal quantities, and fixes the dividing line equidistant from the boundary lines of the parcel thus subdivided.<sup>1</sup>

In the description of land under government surveys, if part of a section or of a quarter section be described as the "north side" or the "north end," the words may be taken to mean the north half of the section or quarter section.<sup>2</sup>

406. The word "part" may be so used as to show that it means "half;"<sup>3</sup> but it may be so used that it is uncertain what meaning is attached to it, and in that case the description will be insufficient.<sup>4</sup> Thus a conveyance of a part of a certain bounty warrant is void for uncertainty as to the part of the certificate sold.<sup>5</sup>

407. The words "more or less," after a statement of the quantity, are intended to cover only a reasonable excess or deficit. If the difference is very great, it is evidence of a mistake which a court of equity may correct. The presence of these words does not imply that the purchaser takes the risk of the quantity. If the variation is slight, the purchaser has no remedy; but if the variation is large or material, he may be relieved from paying for the deficient quantity.<sup>6</sup> The use of these words does not bar an inquiry into a fraud or misrepresentation as to quantity on

<sup>1</sup> *Jones v. Pashby*, 62 Mich. 614, 29 N. W. Rep. 374, 48 Mich. 634, 12 N. W. Rep. 884.

<sup>2</sup> *Winslow v. Cooper*, 104 Ill. 235; *Chiniquy v. People*, 78 Ill. 570.

<sup>3</sup> *Soukup v. Union Inv. Co.* 84 Iowa, 448, 51 N. W. Rep. 167. The description was: "West part N. E. quarter, N. W. quarter, 20 acres." This was held to mean the west 20 acres of the 40 described.

<sup>4</sup> *Roberts v. Deeds*, 57 Iowa, 320, 10 N. W. Rep. 740; *Collins v. Storm*, 75 Iowa, 36, 39 N. W. Rep. 161.

<sup>5</sup> *Curdy v. Stafford* (Tex. Civ. App.), 27 S. W. Rep. 823.

<sup>6</sup> *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Blaney v. Rice*, 20 Pick. 62, 32 Am. Dec. 204; *Hosleton v. Dickinson*, 51 Iowa, 244, 1 N. W. Rep. 550; *Williamson v. Hall*, 62 Mo. 405; *Estes v. Odom*, 91 Ga. 600, 18 S. E. Rep. 355; *Clark v. Scammon*, 62 Me. 47; *Armstrong v. Brownfield*, 32 Kans. 116, 4 Pac. Rep. 185; *Baker v. Light*, 80 Tex. 627, 16 S. W. Rep. 330.

the part of the grantor, and a very material variation in quantity is itself some evidence of such fraud or misrepresentation.<sup>1</sup> The purchaser's previous knowledge of the land or of its boundaries does not preclude him from recovering for fraudulent misrepresentation of quantity if, without fault on his part, he was actually deceived and defrauded by the misrepresentation, provided the deficiency is more than can be fairly covered by the phrase "more or less."<sup>2</sup>

The words "more or less" and the word "about," used in connection with quantity or distances, are words of safety and precaution. They are intended merely to cover some slight or unimportant inaccuracy, and, while enabling an adjustment to the imperative demands of fixed monuments, they do not weaken or destroy the statements of distance and quantity when no other guides are furnished.<sup>3</sup>

**408. Undivided part.** — A conveyance by metes and bounds is limited to an undivided interest by the addition of words such as "being an undivided half thereof." The plain meaning of the language used determines the interest conveyed.<sup>4</sup>

**409. Adjoining, Adjacent, Contiguous.** — The word "adjoining" in a description means next to, or in contact with, and excludes the idea of any intervening space.<sup>5</sup> The word "adjoining" implies a closer relation than "adjacent." The latter word, uncontrolled by the context or subject-matter, is not inconsistent with the idea of something intervening. The description of premises as "adjoining the Atlantic Ocean," with the additional words "bounded on the ocean," carries title to the line of ordinary high water, with all the incidents of riparian ownership upon tidal waters.<sup>6</sup>

The word "contiguous" means in actual contact or touching,

<sup>1</sup> *M'Coun v. Delany*, 3 Bibb, 46, 6 Am. Dec. 635; *Estes v. Odom*, 91 Ga. 600, 18 S. E. Rep. 355.

<sup>2</sup> *Estes v. Odom*, 91 Ga. 600, 18 S. E. Rep. 355.

<sup>3</sup> *Oakes v. De Lancey*, 133 N. Y. 227, 231, per Finch, J.; *Belknap v. Sealey*, 14 N. Y. 143.

<sup>4</sup> *Maxwell v. Hosmer*, 138 Mass. 207.

<sup>5</sup> *Yard v. Ocean Beach Asso.* 49 N. J. Eq. 306, 24 Atl. Rep. 729; *Johnson v. District of Columbia*, 9 Cent. Rep. 653,

655; *People v. Schermerhorn*, 19 Barb. 540, 556; *In re Ward*, 52 N. Y. 395; *Akers v. Railroad Co.* 43 N. J. L. 110. In *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. Rep. 891, a distinction was taken between the words "adjoining" and "bounded," but this was repudiated in the later case of *Perry v. Scott*, 109 N. C. 374, 14 S. E. Rep. 294.

<sup>6</sup> *Yard v. Ocean Beach Asso.* 49 N. J. Eq. 306, 24 Atl. Rep. 729; *State v. Brown*, 27 N. J. L. 13.

and therefore a deed conveying certain salt-works, and "lands contiguous thereto," does not embrace a parcel of land three quarters of a mile from such works, and separated therefrom by the lands of other persons.<sup>1</sup>

#### V. *General and Particular Descriptions.*

410. Where a general description is joined with a particular one, it is a rule of construction that the latter prevails over the former.<sup>2</sup> A general description may be limited, restrained, or controlled by a particular description; but as a rule a particular description is not limited, restrained, or controlled by a general description. The real interest of the parties should, where possible, be gathered from the whole description.<sup>3</sup> The calls in a deed, whether natural or artificial, are divided as regards their relative value into two classes, — descriptive or directory, and special locative calls. "The former, though consisting of rivers, lakes, and creeks, must yield to the special locative calls, for the reason that the latter, consisting of the particular objects upon the lines or corners of the land, are intended to indicate the precise boundary of the land, about which the locator and sur-

<sup>1</sup> *Holston Salt Co. v. Campbell*, 89 Va. 396, 16 S. E. Rep. 274.

<sup>2</sup> *Howell v. Saule*, 5 Mason, 410. **Alabama**: *Guilmartin v. Wood*, 76 Ala. 204; *Sikes v. Shows*, 74 Ala. 382. **Arkansas**: *Doe v. Porter*, 3 Ark. 18. **Connecticut**: *Benedict v. Gaylord*, 11 Conn. 332, 29 Am. Dec. 299. **Indiana**: *Gano v. Aldridge*, 27 Ind. 294. **Iowa**: *Waldin v. Smith*, 76 Iowa, 652, 39 N. W. Rep. 82; *Barney v. Miller*, 18 Iowa, 460. **Maine**: *Herrick v. Hopkins*, 23 Me. 217; *Moore v. Griffin*, 22 Me. 350; *Thorndike v. Richards*, 13 Me. 430. **Massachusetts**: *Melvin v. Proprietors Locks & Canals*, 5 Met. 15, 38 Am. Dec. 384; *Dana v. Middlesex Bank*, 10 Met. 250; *Bott v. Burnell*, 11 Mass. 162; *Makepeace v. Bancroft*, 12 Mass. 469; *Lovejoy v. Lovett*, 124 Mass. 270; *Smith v. Strong*, 14 Pick. 128; *Tyler v. Hammond*, 11 Pick. 193; *Whiting v. Dewey*, 15 Pick. 428; *Winn v. Cabot*, 18 Pick. 553. **Michigan**: *Jones v. Pashby*, 62 Mich. 614, 29 N. W. Rep. 374. **Minnesota**: *Witt v. St. Paul & N.*

*P. Ry. Co.* 38 Minn. 122, 35 N. W. Rep. 862. **Missouri**: *Grandy v. Casey*, 93 Mo. 595; *Hannibal & St. Jo. R. Co. v. Green*, 68 Mo. 169. **New Hampshire**: *Tenny v. Beard*, 5 N. H. 58; *Woodman v. Lane*, 7 N. H. 241; *Bell v. Sawyer*, 32 N. H. 72; *Nutting v. Herbert*, 35 N. H. 120; *Barnard v. Martin*, 5 N. H. 536. **New Jersey**: *Wharton v. Brick*, 49 N. J. L. 289, 8 Atl. Rep. 529; *McEowen v. Lewis*, 26 N. J. L. 451. **New York**: *Case v. Dexter*, 106 N. Y. 548, 13 N. E. Rep. 449; *Jones v. Smith*, 73 N. Y. 205. **North Carolina**: *Carter v. White*, 101 N. C. 30, 7 S. E. Rep. 473. **Oregon**: *Raymond v. Coffey*, 5 Oreg. 132. **Tennessee**: *Wright v. Mabry*, 9 Yerg. 55. **Texas**: *Stafford v. King*, 30 Tex. 257, 94 Am. Dec. 304; *Cullers v. Platt*, 81 Tex. 258, 16 S. W. Rep. 1003. **Vermont**: *Cummings v. Black*, 65 Vt. 76, 25 Atl. Rep. 906; *Spiller v. Scribner*, 36 Vt. 245; *Fletcher v. Clark*, 48 Vt. 211.

<sup>3</sup> *Cullers v. Platt*, 81 Tex. 258, 264, 16 S. W. Rep. 1003.

veyor should be, and are presumed to be, very particular; while the former are called for without any care for exactness, and merely intended to point out or lead a person into the region or neighborhood of the tract surveyed, and hence not considered as entitled to much credit in locating the particular boundaries of the land when they come in conflict with special locative calls, and must give way to them."<sup>1</sup>

411. A particular description is not usually limited by general words of intention, nor does such language restrict the grantor's covenants to his title and interest, when the land itself is the subject-matter of conveyance.<sup>2</sup> The intent to restrict the conveyance as made in the particular description may, however, be made so clear that effect must be given to the general expression of intent. Thus, where three parcels of land were described as if the grantor were conveying the full and absolute interest in the parcels, but he added, "meaning to convey all the land I purchased" of three persons named, "referring to their deeds for particulars," and again saying, "meaning to convey all the land set forth in said deed, and no more," and it appeared that the land acquired by the deeds referred to was only an undivided half interest in the land described, it was held that the deed conveyed an undivided half merely.<sup>3</sup>

A particular description also prevails over a general reference to the premises as being in possession of the grantor, or of some other person named,<sup>4</sup> or as belonging to a person named,<sup>5</sup> or as "being the land set-off" by a certain Indian treaty to a person named.<sup>6</sup>

<sup>1</sup> *Stafford v. King*, 30 Tex. 257, 273, 94 Am. Dec. 304, per Smith, J.

<sup>2</sup> *Clement v. Bank of Rutland*, 61 Vt. 298, 17 Atl. Rep. 717; *Cummings v. Black*, 65 Vt. 76, 25 Atl. Rep. 906; *Brunswick Sav. Inst. v. Crossman*, 76 Me. 577; *Hobbs v. Payson*, 85 Me. 498, 27 Atl. Rep. 519.

<sup>3</sup> *Flagg v. Bean*, 25 N. H. 49; *Woodman v. Lane*, 7 N. H. 241; *Barnard v. Martin*, 5 N. H. 536; *Ousby v. Jones*, 73 N. Y. 621.

<sup>4</sup> *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. Rep. 615, reversing 37 Hun, 639; *Jones v. Smith*, 73 N. Y. 205; *Maker v. Lazell*, 83 Me. 562, 22 Atl. Rep. 474;

*Hobbs v. Payson*, 85 Me. 498, 27 Atl. Rep. 519.

<sup>5</sup> *Hathorn v. Hinds*, 69 Me. 326; *Cullers v. Platt*, 81 Tex. 258, 16 S. W. Rep. 1003. In this case the deed described the land by metes and bounds, and then gave a general description of it as being "all of the . . . survey, except 140 acres belonging to" a certain estate. The particular description was held to control, and only the land contained within the described metes and bounds passed.

<sup>6</sup> *Prentice v. Northern Pac. R. Co.* 154 U. S. 163, 14 Sup. Ct. Rep. 997, per Harlan, J. "The case, then, is this: Looking into the deed under which the

After a definite description by metes and bounds, the grant cannot be enlarged by the addition of the words, "together with the buildings thereon standing," in case the buildings project beyond the boundaries first described.<sup>1</sup>

Where the parcel described was of a specified farm, but a schedule and plan referred to did not include a close which was proved to have been held and treated as a part of the farm, it was held that this close did not pass.<sup>2</sup>

**412. A clause summing up the intention of the parties as to the property conveyed may be given a controlling effect upon all prior phrases used in a general description.**<sup>3</sup>

A conveyance describing land by lots, blocks, or government subdivisions, and adding, at the end of the description, "also together with all other lands that may not have been heretofore described belonging to said" grantor, passes title to a lot not expressly mentioned.<sup>4</sup>

**413. A particular description prevails over a subsequent general reference to a prior deed made for another purpose, and such reference must be rejected.**<sup>5</sup> Such a reference to a prior deed, after a full description, does not alter or change such description in any way, but is regarded as having been inserted for the purpose of showing the grantor's chain of title. Even when

plaintiff claims title, for the purpose of ascertaining the intention of the parties, we find there a specific description, by metes and bounds, of the lands conveyed, followed by a general description which must be held to have been introduced for the purpose only of showing the grantor's chain of title, and not as an independent description of the lands so conveyed."

<sup>1</sup> *Carville v. Hutchins*, 73 Me. 227; *Tyler v. Hammond*, 11 Pick. 193.

<sup>2</sup> *Barton v. Dawes*, 10 C. B. 261.

<sup>3</sup> *Plummer v. Gould*, 92 Mich. 1, 52 N. W. Rep. 146; *Paddack v. Pardee*, 1 Mich. 421; *Ryan v. Wilson*, 9 Mich. 262; *Chapman v. Crooks*, 41 Mich. 595; *Moran v. Lezotte*, 54 Mich. 83; *Jones v. Pashby*, 62 Mich. 614, 621; *Bent v. Rogers*, 137 Mass. 192; *Sprague v. Snow*, 4 Pick. 54, 56; *Witt v. Railway Co.* 38 Minn. 122, 35 N. W. Rep. 862, 865; *Bates v. Foster*, 59 Me. 157, 3 Washb. Real Prop. (5th ed.) 425;

*Barney v. Miller*, 18 Iowa, 460, 466, 467; *Ousby v. Jones*, 73 N. Y. 621.

<sup>4</sup> *Clifton Heights Land Co. v. Randall*, 82 Iowa, 89, 47 N. W. Rep. 905.

<sup>5</sup> *Cassidy v. Charlestown Sav. Bank*, 149 Mass. 325, 21 N. E. Rep. 372; *Dow v. Whitney*, 147 Mass. 1, 16 N. E. Rep. 722; *Lovejoy v. Lovett*, 124 Mass. 270; *Zink v. McManus*, 49 Hun, 583, 3 N. Y. Supp. 487; *Mason v. White*, 11 Barb. 173; *Wilder v. Davenport*, 58 Vt. 642, 5 Atl. Rep. 753; *Sherwood v. Whiting*, 54 Conn. 330, 8 Atl. Rep. 80; *Brunswick Sav. Inst. v. Crossman*, 76 Me. 577; *Hathorn v. Hinds*, 69 Me. 326; *Crosby v. Bradbury*, 20 Me. 61; *Willard v. Moulton*, 4 Me. 14; *Child v. Fickett*, 4 Me. 471; *Brown v. Heard*, 85 Me. 294, 27 Atl. Rep. 182; *Hobbs v. Payson*, 85 Me. 498, 27 Atl. Rep. 519; *Jones v. Webster Woolen Co.* 85 Me. 210, 27 Atl. Rep. 105; *Drew v. Drew*, 28 N. H. 489.

the deed to the grantor is referred to "for a more particular description," but the grantor acquired by the deed referred to only a part of the land described in his deed, which clearly describes the property, the whole of the land so described will pass to the purchaser.<sup>1</sup> Even where the grantor refers to a former deed, and declares his intention "to convey the same and identical real estate conveyed by such deed," the grant is not necessarily controlled by such reference.<sup>2</sup> When land is described as the same conveyed to the grantor by a deed referred to for a particular description, the title to a lot excepted from the deed referred to does not pass, although the grantor at the time of executing his deed had the title to the excepted lot.<sup>3</sup>

A general description of a farm described by name, or as that on which the grantor lives, may control a reference to a deed by which the grantor holds title, so that, if the deed referred to describes more or less land than the farm contains as described, the parcel that passes is the farm described by name or occupancy.<sup>4</sup>

A reference to a description in a prior deed becomes of importance when the particular description is imperfect or doubtful, and the particular description is in such case aided rather than controlled by the reference.<sup>5</sup>

414. Very much depends upon the circumstances of the case and the nature of the descriptions used. If the general description is definite and certain, and is proved to be correct by reference to the land itself, or in any other way, or if in any way the intention of the parties appears to have been to convey the

<sup>1</sup> *Crosby v. Bradbury*, 20 Me. 61.

<sup>2</sup> *Brunswick Sav. Inst. v. Crossman*, 76 Me. 577.

<sup>3</sup> *Getchell v. Whittemore*, 72 Me. 393.

<sup>4</sup> *Anburn Cong. Church v. Walker*, 124 Mass. 69; *Hastings v. Hastings*, 110 Mass. 280; *Melvin v. Proprietors of Locks and Canals*, 5 Met. 15, 38 Am. Dec. 384; *Green Bay & Miss. Canal Co. v. Hewitt*, 55 Wis. 96, 42 Am. Rep. 701; *Madden v. Tucker*, 46 Me. 367; *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46.

<sup>5</sup> *Weller v. Barber*, 110 Mass. 44; *Hathorn v. Hinds*, 69 Me. 326. In *Lovejoy v. Lovett*, 124 Mass. 270, it was contended that the concluding clause in the descrip-

tion in the deed, "being the same premises conveyed to me by Ezra Holden by deed dated May 7, 1829," was a general description of the lot conveyed, and, as the particular description was uncertain and indefinite as to the northerly line, the general description should prevail. It was said by the court that it was not sufficient to overcome the inferences to be drawn from the other parts of the deed, the reference being made to show only chain of title. A general description may be looked to in aid of a particular description that is defective or doubtful, but not to control or override a particular description about which there can be no doubt.

land thus generally described, the general description will prevail as against a description by courses and distances, so far as these descriptions differ.<sup>1</sup> It is a recognized fact that mistakes are very liable to occur in descriptions by courses and distances.<sup>2</sup> Every part of the description is to be taken into consideration, and in general that part of the description will control which is the most definite and best expresses the intent of the parties as shown from the whole description.<sup>3</sup> Thus, when at the end of the description of a farm there was added the statement that "the above description includes a small lot known as the 'S' lot," but the description in fact did not include quite all that lot, which contained three fourths of an acre, but omitted a narrow strip comprising one eighth of an acre, it was held that the deed conveyed the whole of that lot.<sup>4</sup>

415. The relative importance of different modes of description depends also very much upon the accuracy with which the descriptions are made. Where there is a clear and definite description of the parcels by boundaries, any subordinate and additional description by occupancy or the like, inconsistent with such essential description, should be rejected.<sup>5</sup> A mistake shown to have been made in one form of description discredits that part of the description, and makes another part of the description, which is ordinarily in itself not so important, the controlling description in that instance. Thus a description by occupancy is ordinarily a minor and unimportant form of description; but this form of description may through inaccuracy or ambiguity in a

<sup>1</sup> *Barney v. Miller*, 18 Iowa, 460; *Inst. v. Croesman*, 76 Me. 577; *Bates v. Adams v. Alkire*, 20 W. Va. 480; *Credle v. Hays*, 88 N. C. 321; *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. Rep. 436; *Harkey v. Cain*, 69 Tex. 146, 6 S. W. Rep. 637; *Jackson v. Loomis*, 18 Johns. 81, 19 Johns. 449; *Jackson v. Clark*, 7 Johns. 217; *Hathaway v. Power*, 6 Hill, 453; *Wade v. Deray*, 50 Cal. 376; *Johnson v. Simpson*, 36 N. H. 91; *Bott v. Burnell*, 11 Mass. 163; *Rayburn v. Winant*, 16 Ore. 318, 18 Pac. Rep. 588.

<sup>2</sup> *Houser v. Belton*, 10 Ired. 358, 51 Am. Dec. 391; *Davidson v. Arledge*, 88 N. C. 326.

<sup>3</sup> *Case v. Dexter*, 106 N. Y. 548; *Ousby v. Jones*, 73 N. Y. 621; *Brunswick Sav.*

<sup>4</sup> *Ludlow v. Carr*, 5 N. Y. Supp. 502.

<sup>5</sup> *Doe v. Galloway*, 5 B. & Ad. 43; *Dyne v. Nutley*, 14 C. B. 122; *Lutcher & Moore Lumber Co. v. Hart* (Tex. Civ. App.), 26 S. W. Rep. 94.

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more important form of description, or from failure to employ a more important form, become an essential part of the description and control the rest of it. A specific reference for a boundary to the land of another person controls a general reference to the boundary as land formerly conveyed to the grantor by a person named. "Where a deed contains two irreconcilable descriptions of the entire boundaries of a tract of land, or of a single line, calls for more stable monuments, such as the lines of other tracts or well-known natural objects, will be adopted, rather than course and distance."<sup>1</sup>

**416.** A rule which amounts to very much the same thing is to the effect that, of two descriptions equally explicit and unambiguous, that must control which best expresses the intentions of the parties as manifested by the whole instrument.<sup>2</sup> Thus, where a lot was described as bounding on a street named, and the remainder of the description was definite by metes and bounds, but this further description was added, "intending to include only the land on which said buildings are situated, and the yard inclosed within the fence now built," it was held that the latter description was incorrect because it would leave a narrow strip of land between the fence and the street, and it could not have been the intention of the parties to do this.<sup>3</sup>

Several lots were described by numbers, with the further description, "being all of block 25." The lots so numbered were not in that block, but in another. But it appearing to be the grantor's intention to convey the block in which he resided, and that he resided in the block named in the deed, it was accordingly held that that block passed by the deed.<sup>4</sup> A general description controls when the particular description is uncertain or impossible.<sup>5</sup>

**417.** A rule of construction that the first description in a deed is presumed to express the true intention of the parties has been invoked "to tip the nodding beam."<sup>6</sup> But this cannot

<sup>1</sup> *Cox v. McGowan* (N. C.), 21 S. E. Rep. 108, per Avery, J.

<sup>2</sup> *Driscoll v. Green*, 59 N. H. 101; *White v. Gay*, 9 N. H. 126, 31 Am. Dec. 224; *Lane v. Thompson*, 43 N. H. 320; *Richardson v. Palmer*, 38 N. H. 212; *Harris v. Hull*, 70 Ga. 831; *Stafford v. King*, 30 Tex. 257, 271, 94 Am. Dec. 304; *Bor-*

*ney v. Miller*, 18 Iowa, 460; *Mullaly v. Noyes* (Tex. Civ. App.), 26 S. W. Rep. 145.

<sup>3</sup> *Driscoll v. Green*, 59 N. H. 101.

<sup>4</sup> *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61.

<sup>5</sup> *Sawyer v. Kendall*, 10 Cush. 241.

<sup>6</sup> *Vance v. Fore*, 24 Cal. 435.



be regarded as a sound rule of construction. "A specific description, whether it comes before or after a general designation, must prevail, upon the underlying principle that the law will always demand the production of the highest evidence, and, as between two descriptions, will prefer that which is most certain."<sup>1</sup>

There is no rule that, if clauses in a description of land are repugnant, the first necessarily prevails over the last.<sup>2</sup>

**418. It is a rule of construction that a private grant shall be taken most favorably for the grantee** in case the construction is left in doubt after the application of other rules, for it is assumed that the language of the deed is the language of the grantor. Hence it is said that, in case there are two descriptions in a deed which are inconsistent, the grantee is at liberty to elect that which is most favorable to him.<sup>3</sup>

Where there are two descriptions, the one general and the other special, which are repugnant, the grantee may rely on that which is most beneficial to himself.<sup>4</sup> The argument for this rule rests upon the general proposition that the intention of the parties must prevail, unless it contravenes some settled rule of law; and a deed is to be construed most beneficially for the grantee whenever there is a necessity for resorting to that maxim.

**419. But this rule does not apply to a grant from the sovereign.** The rule of construction applicable to public grants is quite the opposite. Sir William Scott thus states the rule and the reason for it: "All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants, and upon this just ground: that, the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emolu-

<sup>1</sup> *Cox v. McGowan* (N. C.), 21 S. E. Rep. 108, per Avery, J., in substantially his words. In *Carter v. White*, 101 N. C. 30, 7 S. E. Rep. 473, the court held that the first description, "known as Walker's Island," must yield to a more specific one, by metes and bounds, which did not include the whole island.

<sup>2</sup> *Rathbun v. Geer* (Conn.), 30 Atl. Rep. 60.

<sup>3</sup> *Melvin v. Proprietors of Docks & Canals*, 5 Met. 15, 27, 38 Am. Dec. 384;

*Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Cottingham v. Parr*, 93 Ill. 233; *Cox v. McGowan* (N. C.), 21 S. E. Rep. 108, per Avery, J.

<sup>4</sup> *Brown v. Cranberry Iron Co.* 59 Fed. Rep. 434, 437; *Winter v. White*, 70 Md. 305, 17 Atl. Rep. 84; *Hall v. Gittings*, 2 H. & J. 112; *Buchanan v. Stewart*, 3 H. & J. 329; *Hager v. Spect*, 52 Cal. 579; *Vance v. Fore*, 24 Cal. 435.

ments are diminished by any grant, beyond what such grant, by necessary and unavoidable construction, shall take away."<sup>1</sup>

420. Where property is sufficiently described as a whole, the description is not validated or restricted by a further general reference or statement which is inconsistent with the description as a whole. Thus a description of property as the grantor's farm or homestead on which he resides, or on which some other person lives, is sufficient to pass the farm or homestead so occupied, although some particular circumstance be added which is inconsistent with such description, as for instance a reference for boundaries to a deed which embraced only a part of the farm or homestead;<sup>2</sup> or a statement of quantity which is much less than the whole farm;<sup>3</sup> or even a particular description by courses and distances which does not include the whole farm.<sup>4</sup> Where one made a deed of land situate in a town named, and containing two hundred and thirty acres, more or less, being "all the lands which I own in said town, the butts and bounds to be found in the county records," and an examination of the records showed that the grantor owned by purchase two hundred and thirty-five acres of land in that town, but it appearing that he had acquired title by possession to another tract of about fifty acres, it was held that the latter tract as well as those of which he had record title passed by his deed.<sup>5</sup> A grant of all the grantor's real estate situated in a town named conveys all his land there situated.<sup>6</sup>

In like manner a particular description by metes and bounds prevails over a general description of the lands as being "all" of a certain tract, though the particular description does not cover all the lands in the tract named.<sup>7</sup>

<sup>1</sup> *The Rebeckah*, 1 C. Rob. Adm. 227, 230. To the same effect, *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548; *Martin v. Waddell*, 16 Pet. 367, 411; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 49, 11 Sup. Ct. Rep. 478; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, per Gray, J.

<sup>2</sup> *Eliot v. Thatcher*, 2 Met. 44; *Thatcher v. Howland*, 2 Met. 41; *Hastings v. Hastings*, 110 Mass. 280; *Melvin v. Proprietors of Locks & Canals*, 5 Met. 15, 38 Am. Dec. 384; *Auburn Cong. Church v. Walker*, 124 Mass. 69; *Sherwood v. Whiting*, 54 Conn. 330, 8 Atl. Rep. 80; *Green Bay & M. Canal Co. v. Hewett*, 55

Wis. 96, 12 N. W. Rep. 382, 42 Am. Rep. 701.

<sup>3</sup> *Andrews v. Pearson*, 68 Me. 19; *Jackson v. Barringer*, 15 Johns. 471; *Rutherford v. Tracy*, 48 Mo. 325, 8 Am. Rep. 104.

<sup>4</sup> *Cate v. Thayer*, 3 Me. 71; *Keith v. Reynolds*, 3 Me. 393; *Lodge v. Lee*, 6 Cranch, 237; *Union Ry. & T. Co. v. Skinner*, 9 Mo. App. 189; *Haley v. Amestoy*, 44 Cal. 132.

<sup>5</sup> *Field v. Huston*, 21 Me. 69.

<sup>6</sup> *Hobbs v. Payson*, 85 Me. 498, 27 Atl. Rep. 519.

<sup>7</sup> *Cummings v. Black*, 65 Vt. 76, 25 Atl. Rep. 906; *Spiller v. Scribner*, 36 Vt. 245.

421. In like manner a description of property by a name well known and usually applied to it prevails over a description by measurement.<sup>1</sup> When the subject-matter of a conveyance is completely identified by its name, the addition of another particular which is inconsistent will be rejected as surplusage. Thus, where land conveyed was described as the "Mount Pleasant Fishery," with the land attached to the same, supposed to be one thousand yards in length, bounded by the brink or brow of the hill on one side and by the river on the other, from one end of the beach to the other, it was held that only that part of the beach known as the "Mount Pleasant Fishery," and the land necessary and convenient for using it, passed, there being no certain beginning point.<sup>2</sup>

422. The grant of a house, a store, a wharf, a mill, or other structure passes the fee in the land occupied and improved at the time of the grant for the use or purpose designated;<sup>3</sup> for the grant of such a structure necessarily comprehends and aptly describes the entire beneficial occupation and enjoyment of the land itself continuously and permanently, and clearly indicates an intent to pass the grantor's whole interest in the soil.<sup>4</sup>

A conveyance of "a message," described merely by metes and bounds, cannot be construed as embracing a public burial ground, so as to establish a claim of adverse possession thereto, though the conveyance does not except the burial ground. A parcel of land so used is no part of a message.<sup>5</sup>

A reservation of "a barn" includes a sheep-shed connected with it and the barnyard fenced and used with it, and the land covered by these buildings and barnyard. The term "barn" should be construed to include in addition to the barn itself whatever is connected with it, and is essential to its use and enjoyment as a barn.<sup>6</sup>

<sup>1</sup> *Haley v. Amestoy*, 44 Cal. 132; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. Rep. 491; *Vejar v. Mound City Asso.* 97 Cal. 659, 32 Pac. Rep. 713; *Harkey v. Cain*, 69 Tex. 146, 6 S. W. Rep. 637; *Paroni v. Ellison*, 14 Nev. 60. Dec. 238; *Esty v. Currier*, 98 Mass. 500; *Hatch v. Brier*, 71 Me. 542; *Cunningham v. Webb*, 69 Me. 93; *Moulton v. Trafion*, 64 Me. 218; *Pottkamp v. Buss* (Cal.), 31 Pac. Rep. 1121.

<sup>2</sup> *Scull v. Pruden*, 92 N. C. 168.

<sup>3</sup> *St. Thomas's Hospital v. Charing Cross Ry. Co.* 1 Johns. & H. 400; *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159; *Allen v. Scott*, 21 Pick. 25, 32 Am.

<sup>4</sup> *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159, per Bigelow, C. J.

<sup>5</sup> *Southampton v. Post*, 4 N. Y. Supp. 75.

<sup>6</sup> *Cunningham v. Webb*, 69 Me. 92; *Hilton v. Gilman*, 17 Me. 263.

**423.** A description of a lot by name or number, upon a plat or map referred to, ordinarily prevails over a description by courses and distances, and over calls for monuments, or other particulars used in a description, for the reason that the lot itself, with the name or number by which it is known, is the prominent thing, and therefore there is less likelihood of uncertainty in regard to it than in regard to the particulars of the description, which are employed to identify more particularly the principal thing, the lot itself.<sup>1</sup> Thus, where a lot conveyed was described by number upon a recorded plat, and was also described as being sixty feet wide and one hundred and twenty feet deep, but the lot on the plat was only twenty-six feet wide, it was held that, although the grantor owned the adjoining land, his deed conveyed only the lot described by the plat, and that the word in the deed describing the width of the lot must be rejected as *falsa demonstratio*.<sup>2</sup>

Of course, if there is evidence indicating an intention that the description by monuments or measurement shall prevail over the general description by lot, this intention will be enforced.<sup>3</sup> If it appears that there is an error in the number of a lot, a description by definite boundaries will prevail. This was the case where "beach and water property" was conveyed by definite exterior boundaries, and was further described as blocks numbered one to thirty-two inclusive on a map referred to, but one block within such boundaries was numbered thirty-three: it was held that the description by boundaries controlled.<sup>4</sup>

A description of land by lot numbers is not void though the recorded plat shows no division of it into lots, but merely into blocks, if it be shown that the owner had always treated it as divided into lots, and it appears that the property had been conveyed and generally known by lot numbers.<sup>5</sup>

<sup>1</sup> *Masterson v. Munro* (Cal.), 38 Pac. Rep. 1106; *O'Herrin v. Brooks*, 67 Miss. 266, 6 So. Rep. 844; *Magoun v. Lapham*, 21 Pick. 135; *Rutherford v. Tracy*, 48 Mo. 326, 8 Am. Rep. 104; *Union Ry. & T. Co. v. Skinner*, 9 Mo. App. 189; *Nash v. Wilmington, &c. R. Co.* 67 N. C. 413, 416; *Amb v. Chicago, St. P., M. & O. Ry.* Co. 44 Minn. 266, 46 N. W. Rep. 321; *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. Rep. 436; *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 441.

<sup>2</sup> *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. Rep. 436.

<sup>3</sup> *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. Rep. 436, explaining *Sikes v. Showers*, 74 Ala. 382; *Worthington v. Hylyer*, 4 Mass. 196.

<sup>4</sup> *Friedman v. Nelson*, 53 Cal. 589.

<sup>5</sup> *Marvin v. Elliott*, 99 Mo. 616, 12 S. W. Rep. 899.

VI. *References to Maps and Surveys.*

**424.** The effect of a reference to a plan, map, or plat of the land, whether this be recorded or not, is to incorporate it in the deed.<sup>1</sup> A reference to a survey, whether this be delineated on a plat or not, makes it a part of the deed, and both must be construed together.<sup>2</sup> The boundaries, monuments, courses, and distances laid down on a map referred to are as much to be regarded the true descriptions of the land as if they were expressly recited in the deed.<sup>3</sup> If the plat or survey enables a surveyor to locate the boundary lines with certainty, a reference to this is in itself a sufficient description.<sup>4</sup> A reference to the field-notes of a sur-

<sup>1</sup> *Jefferis v. East Omaha Land Co.* 134 U. S. 178; *Noonan v. Lee*, 2 Black, 499; *Deery v. Cray*, 10 Wall. 263. **California**: *Chapman v. Polack*, 70 Cal. 487, 11 Pac. Rep. 764; *Hudson v. Irwin*, 50 Cal. 450; *Penry v. Richards*, 52 Cal. 496; *Vance v. Fore*, 24 Cal. 435; *Powers v. Jackson*, 50 Cal. 429; *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. Rep. 47. **Florida**: *Andreu v. Watkins*, 26 Fla. 390, 7 So. Rep. 876. **Georgia**: *Sears v. King*, 91 Ga. 577, 18 S. E. Rep. 830. **Illinois**: *Piper v. Connelly*, 108 Ill. 646. **Indiana**: *Brophy v. Richeson (Ind.)*, 36 N. E. Rep. 424, 427. **Kansas**: *Miller v. Land Co.* 44 Kans. 354, 24 Pac. Rep. 420. **Maine**: *Kennebec Purchase Co. v. Tiffany*, 1 Me. 219, 10 Am. Dec. 60; *Thomas v. Patten*, 13 Me. 329; *Erskine v. Moulton*, 66 Me. 276; *Lincoln v. Wilder*, 29 Me. 169. **Massachusetts**: *Walker v. Boynton*, 120 Mass. 849; *Boston Water Power Co. v. Boston*, 127 Mass. 374; *Morse v. Rogers*, 118 Mass. 572; *Whitman v. Boston & Me. R. Co.* 3 Allen, 133; *Chaffin v. Chaffin*, 4 Gray, 280; *Allen v. Bates*, 6 Pick. 460; *Foss v. Crisp*, 20 Pick. 121; *Magoun v. Lapham*, 21 Pick. 135; *Davis v. Rainsford*, 17 Mass. 207. **Michigan**: *Nichols v. New Eng. Furniture Co.* 100 Mich. 230, 59 N. W. Rep. 155; *Heffelman v. Otsego Water Power Co.* 78 Mich. 121, 43 N. W. Rep. 1096, 44 N. W. Rep. 1151; *Wiley v. Lovely*, 46 Mich. 83, 8 N. W. Rep. 716; *Quinrim v. Reimers*, 46 Mich. 605, 10 N. W. Rep. 35. **Minnesota**: *Borer v. Lange*, 44 Minn. 281, 46 N. W. Rep. 358; *Sanborn v. Mueller*, 38 Minn. 27, 35 N. W. Rep. 666; *Coles v. Yorks*, 36 Minn. 388, 31 N. W. Rep. 333; *Nicolin v. Schneiderhan*, 37 Minn. 63, 33 N. W. Rep. 33; *Reed v. Lammell*, 28 Minn. 306, 9 N. W. Rep. 858. **Missouri**: *Whitehead v. Ragan*, 106 Mo. 231, 17 S. W. Rep. 307; *Dolde v. Vodicka*, 49 Mo. 98; *Shelton v. Maupin*, 16 Mo. 124; *St. Louis v. Missouri Pac. Ry. Co.* 114 Mo. 13, 21 S. W. Rep. 202. **North Carolina**: *Davidson v. Arledge*, 88 N. C. 326, 97 N. C. 172, 2 S. E. Rep. 378. **Pennsylvania**: *Birmingham v. Anderson*, 48 Pa. St. 253. **Wisconsin**: *Shufeldt v. Spaulding*, 37 Wis. 662; *Burbach v. Schweinler*, 56 Wis. 386, 14 N. W. Rep. 449.

<sup>2</sup> *Heffelman v. Otsego Water Power Co.* 78 Mich. 121, 43 N. W. Rep. 1096, 44 N. W. Rep. 1151; *Hudson v. Irwin*, 50 Cal. 450; *Serrano v. Rawson*, 47 Cal. 52; *Black v. Sprague*, 54 Cal. 266.

<sup>3</sup> *Davis v. Rainsford*, 17 Mass. 207; *Grand Junc. R. R. Co. v. County Commissioners*, 14 Gray, 553; *Cunningham v. Boston & A. R. R. Co.* 153 Mass. 506, 27 N. E. Rep. 660; *Erskine v. Moulton*, 66 Me. 276; *Ambrose v. Raley*, 58 Ill. 506.

<sup>4</sup> *St. Louis v. Wiggins Ferry Co.* 15 Mo. App. 227.

vey for a description of the land renders such notes admissible in evidence to show the location of the land.<sup>1</sup>

When lands are granted according to an official plat of a survey, the plat itself, with all its notes, lines, descriptions, and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.<sup>2</sup>

**425. An unrecorded plan or plat which is referred to in a deed may be identified by parol evidence ;<sup>3</sup> and as against the grantor and his privies it is a sufficient identification to show that he exhibited it as the plat referred to.<sup>4</sup>**

Although a map or plat may be identified by parol evidence,<sup>5</sup> in order to avoid questions as to identity it is desirable that the map or plat should be annexed to or indorsed upon the deed, if it is not already recorded. Plans made at the time of a conveyance are usually recorded with it, and the deed should then refer to the plan and state that it is to be recorded therewith. But even then there is a chance that the question of identity may be raised if the plan is not annexed to or indorsed upon the deed.

**426. A map or diagram drawn on a deed, in such relation to or connection with the descriptive words of the deed as to indicate to any reasonable person that the grantor intended it to be taken as a part of the description, is admissible in evidence as a part of the deed when that is admitted in evidence, although not referred to in the deed itself. "When the map is on the deed itself, the court of necessity must examine it, and from it, taken together with the words of description, determine what the deed conveys."<sup>6</sup> But it has been held that a plan or map attached to a deed, but not referred to in it, cannot be used to explain it.<sup>7</sup>**

<sup>1</sup> *Irvin v. Bevil*, 80 Tex. 332, 16 S. W. N. W. Rep. 358; *Hicklin v. McClear*, Rep. 21; *Norton v. Conner* (Tex.), 14 S. 18 Oreg. 126, 22 Pac. Rep. 1057; *Penry* W. Rep. 193; *Nye v. Moody*, 70 Tex. v. Richards, 52 Cal. 496.

<sup>2</sup> *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. Rep. 203; *Woods v. West*, 40

*Neb.* 307, 58 N. W. Rep. 938; *Whitney v. Lumber Co.* 78 Wis. 240, 47 N. W. Rep. 425; *Jefferis v. Land Co.* 134 U. S. 178, 10 Sup. Ct. Rep. 518.

<sup>3</sup> *Hodges v. Horsfall*, 1 Russ. & Mylne, 116; *Borer v. Lange*, 44 Minn. 281, 46

<sup>4</sup> *Redd v. Murry*, 95 Cal. 48, 30 Pac. Rep. 132, 24 Pac. Rep. 841.

<sup>5</sup> *Penry v. Richards*, 52 Cal. 496; *Redd*

*v. Murry*, 95 Cal. 48, 30 Pac. Rep. 132, 24

Pac. Rep. 841.

<sup>6</sup> *Murray v. Klinzing*, 64 Conn. 78, 29

Atl. Rep. 244.

<sup>7</sup> *Wyse v. Leahy*, Ir. R. 9, C. L. 384.

427. Even if the deed does not expressly refer to a recorded plat of the land and make it a part of the description, still, if the only way of making out the description and identifying the land is by means of the plat, it may properly be supposed that the parties contracted with reference to the plat, and this may be looked to as a part of the description.<sup>1</sup> Thus, where one granted two lots, each sixty feet wide, in a certain block owned and laid out by the grantor, a plat of which he had filed in the county clerk's office, according to which the block contained a large number of lots, all of which were twenty-six feet wide, it was held that the words describing the width of the lot must be rejected as *falsa demonstratio*, and that, in the absence of competent proof to the contrary, the parties must be presumed to have contracted with reference to the real condition of the property.<sup>2</sup>

A plat of the land made for the grantor, but not shown to the grantee at the time of the conveyance or before, and not referred to in the deed, is inadmissible to control the boundaries as described by the deed.<sup>3</sup>

428. The loss of a plat referred to in a deed does not invalidate the deed if the land can be laid out upon the ground in substantial accordance with the plan.<sup>4</sup> A plat referred to as annexed to a deed, though it has become separated from it, may be identified as the plat annexed, and it is then admissible in evidence.<sup>5</sup> A reference in a deed to a plat is evidence as against the

<sup>1</sup> *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. Rep. 436; *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. Rep. 708; *Burbach v. Schweinler*, 56 Wis. 386, 14 N. W. Rep. 449; *Sheppard v. Wilmott*, 79 Wis. 15, 47 N. W. Rep. 1054; *Elliott v. Gibson* (Ky.), 29 S. W. Rep. 620; *Hanlon v. Union Pac. Ry. Co.* (Neb.) 58 N. W. Rep. 590.

<sup>2</sup> *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. Rep. 436. Marr, J., said: "The language of this description indicates that the dominant idea in the mind of the grantor, when the deeds were made, was of lots Nos. 1 and 2, in block No. 2, as a whole, and as they had really been established in his addition, and not the particular lines by which they might be described otherwise." See, also, *Haley v.*

*Amestoy*, 44 Cal. 132; *Wade v. Deray*, 50 Cal. 376.

<sup>3</sup> *Hall v. Eaton*, 139 Mass. 217, 29 N. E. Rep. 660.

<sup>4</sup> *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73. In *Hicklin v. McClear*, 18 Oreg. 126, 22 Pac. Rep. 1057, it was held, in an action involving the title to certain town lots, that the facts relating to platting of the town site by the proprietors, their dedication of the streets and alleys by conveying lots therein, the existence of the two plats, and their similitude in fact, were admissible in evidence to identify the property then in controversy. See *Sperry v. Wesco* (Oreg.), 38 Pac. Rep. 623.

<sup>5</sup> *McCullough v. Wall*, 4 Rich. (S. C.) 68, 53 Am. Dec. 715.

grantor of the existence of such a plat; and evidence tending to show a survey of the town prior to the conveyance, and that the grantor produced the plat in question some years afterwards as such plat, is sufficient to identify it as that mentioned in the deed.<sup>1</sup>

**429.** If a plat referred to for the description of the parcels be imperfect or incomplete, the description will nevertheless be sufficient to pass the title, if the parcels intended to be conveyed are known to the parties, and are susceptible of identification according to the actual survey on the ground.<sup>2</sup> A description of land as a numbered lot or block on a certain plat is sufficiently definite, although the plat on its face furnishes no data for locating the lot or block, if with the aid of parol evidence the land can be identified.<sup>3</sup> Though the plat be referred to as recorded, when in fact it was not recorded, the grant is not therefore invalidated, but the unrecorded plat may be used to identify the parcel, or this may be identified by parol evidence.<sup>4</sup> The statement that the plat referred to is recorded, when it is not, will be rejected as *falsa demonstratio*.

Evidence that the recorded plat referred to in a deed differs from the original plat should not be received. If there is any error or mistake in the reference, the deed should be reformed in equity.<sup>5</sup>

Where a description refers to a map, and also to monuments at the corners of the lot, parol testimony is admissible to show that the map is inaccurate, and was compiled from other maps without an actual survey, and that the land which the grantor intended to sell, and the grantee to buy, was that staked off and located by the survey.<sup>6</sup>

**430.** The fact that the plat referred to is invalid, because not made and filed in accordance with statutory provisions, does not affect the deed. A reference to a void deed, or a void plat, for a description, is just as effectual as a reference to a valid

<sup>1</sup> *Redd v. Murry*, 95 Cal. 48, 24 Pac. Rep. 841, 30 Pac. Rep. 132.

<sup>2</sup> *Noonan v. Lee*, 2 Black, 499; *Borer v. Lange*, 44 Minn. 281, 46 N. W. Rep. 358; *Wiley v. Lovely*, 46 Mich. 83, 8 N. W. Rep. 716; *Corbett v. Norcross*, 35 N. H. 99.

<sup>3</sup> *Redd v. Murry*, 95 Cal. 48, 30 Pac. Rep. 132.

<sup>4</sup> *Johnstone v. Scott*, 11 Mich. 232; *Wiley v. Lovely*, 46 Mich. 83, 8 N. W. Rep. 716.

<sup>5</sup> *Jones v. Johnston*, 18 How. 150.

<sup>6</sup> *Cleveland v. Choate*, 77 Cal. 73, 18 Pac. Rep. 875.



deed or valid plat, if the description is correct and the deed or plat referred to is accessible.<sup>1</sup>

Maps or plans that have been in use many years, and agree with the original surveys, are not to be held erroneous because they do not agree with resurveys made long afterwards, and based upon information furnished by persons living.<sup>2</sup>

**431. When there is a conflict between a map or plat and an actual survey the latter controls,** and the reference to the map may be rejected as surplusage.<sup>3</sup> This is true though the map be the official map of a town. Of course this is upon the supposition that the corners and lines established by the survey can be identified.<sup>4</sup> Parol evidence is admissible to show that there is a conflict between the survey in the field from which the map was made and the map itself, in order to determine the correct boundary of a parcel.<sup>5</sup>

A call in a deed for a natural boundary, like a lake, controls the grant as against a plat annexed and referred to upon which the lake does not appear.<sup>6</sup>

The lines of a survey marked on the ground constitute the actual survey and control courses.<sup>7</sup> They control a general description of a boundary, as "up the bayou."<sup>8</sup>

Where there is a variance between the plat and the field-notes of the original survey of public lands, the former must control, since it represents the lines and corners as fixed by the surveyor-general, and by which the land was sold.<sup>9</sup>

<sup>1</sup> *Young v. Cosgrove*, 83 Iowa, 682, 49 N. W. Rep. 1040; *Nichols v. New Eng. Furniture Co.* 100 Mich. 230, 59 N. W. Rep. 155; *Brewington v. Jenkins*, 85 Mo. 57; *Cottingham v. Seward* (Tex. Civ. App.), 25 S. W. Rep. 797.

<sup>2</sup> *McCombs v. Sheldon* (Tex. Civ. App.), 26 S. W. Rep. 1114.

<sup>3</sup> *Cleveland v. Choate*, 77 Cal. 73, 18 Pac. Rep. 875; *O'Farrel v. Harney*, 51 Cal. 125; *Penry v. Richards*, 52 Cal. 496; *Whiting v. Gardner*, 80 Cal. 78, 22 Pac. Rep. 71; *Racine v. Case Plow Co.* 56 Wis. 539, 14 N. W. Rep. 599; *Koenigs v. Jung*, 73 Wis. 178, 40 N. W. Rep. 801; *Marsh v. Mitchell*, 25 Wis. 706; *Bradstreet v. Dunham*, 65 Iowa, 248, 250, 21 N. W. Rep. 592; *Root v. Cincinnati*, 87 Iowa, 202, 54 N. W. Rep. 206; *Jackson v. Cole*,

16 Johns. 257; *Jackson v. Freer*, 17 Johns. 31.

<sup>4</sup> *O'Farrel v. Harney*, 51 Cal. 125.

<sup>5</sup> *O'Farrel v. Harney*, 51 Cal. 125.

<sup>6</sup> *Literary Fund v. Clark*, 9 Ired. 58.

<sup>7</sup> *Riddlesburg Iron, &c. Co. v. Rogers*, 65 Pa. St. 416; *Hall v. Tanner*, 4 Pa. St. 244, 45 Am. Dec. 686; *Quinn v. Heart*, 43 Pa. St. 337; *Bean v. Bachelder*, 78 Me. 184, 3 Atl. Rep. 279; *Heaton v. Hodges*, 14 Me. 66, 30 Am. Dec. 731.

<sup>8</sup> *Lutcher, &c. Lumber Co. v. Hart* (Tex. Civ. App.), 26 S. W. Rep. 94, referred to and distinguished from *Bland v. Smith* (Tex. Civ. App.), 26 S. W. Rep. 773.

<sup>9</sup> *Beaty v. Robertson*, 130 Ind. 589, 30 N. E. Rep. 706; *Doe v. Hildreth*, 2 Ind. 274; *Chapman v. Polack*, 70 Cal. 487, 11

In construing a deed describing land by the government survey the court must ascertain the corners of the survey as actually established, and not as they ought to have been established. The presumption is that the deed was intended to convey according to the established corners. This presumption may be rebutted by evidence that the parties were mistaken as to the location of the government line, and intended to convey a definite tract. But this presumption is by no means conclusive; and, while parol evidence will not be admitted to dispute the written contract, it may be admitted to explain it, and to show the understanding of the parties.<sup>1</sup>

432. Where a plat delineates an actual survey, the survey rather than the plat fixes the location and the boundaries of the land. The plat is a picture, the survey the substance. In a conveyance referring to such plat, the lot bounded by the lines actually run upon the ground is the lot intended to be conveyed. The plat may be all wrong, but that does not matter if the actual survey can be shown.<sup>2</sup> A boundary by a street which has been surveyed and marked by visible monuments prevails as against a plat which varies the location of the street. The line of the street is determined by the survey rather than by the recorded plat. The courses and distances of a survey are always regarded as more or less uncertain, and always give place, in cases of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land, whether such monuments be natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings.<sup>3</sup>

Pac. Rep. 764; *Cornett v. Dixon* (Ky.), 11 S. W. Rep. 660. In *Vance v. Fore*, 24 Cal. 435, it was said: "The map may be regarded as a daguerreotype of the land which the grantor intended to convey."

<sup>1</sup> *Squire v. Greer*, 2 Wash. St. 209, 26 Pac. Rep. 222.

<sup>2</sup> *Beann v. Bachelder*, 78 Me. 184, 3 Atl. Rep. 279; *Esmond v. Tarbox*, 7 Me. 61, 20 Am. Dec. 346; *Pike v. Dyke*, 2 Me. 213; *Williams v. Spaulding*, 29 Me. 112; *Burkholder v. Markley*, 98 Pa. St. 37; *Riddlesburg Iron, &c. Co. v. Rogers*, 65 Pa. St. 416; *Marsh v. Mitchell*, 25 Wis. 706; *O'Farrel v. Harney*, 51 Cal.

125; *Penry v. Richards*, 52 Cal. 496; *Smith v. Boone*, 84 Tex. 526, 19 S. W. Rep. 702; *Graham v. Dewees*, 85 Tex. 395, 20 S. W. Rep. 127; *Root v. Cincinnati*, 87 Iowa, 202, 54 N. W. Rep. 206; *Bradstreet v. Dunham*, 65 Iowa, 248, 21 N. W. Rep. 592; *Whitehead v. Ragan*, 106 Mo. 235, 17 S. W. Rep. 307; *Kronenberg v. Hoffner*, 44 Mo. 185; *Dolde v. Vodicka*, 49 Mo. 98.

<sup>3</sup> *Higuera v. United States*, 5 Wall. 827; *United States v. Sutter*, 21 How. 170; *Grier v. Penn. Coal Co.* 128 Pa. St. 79, 18 Atl. Rep. 480; *Wolfe v. Scarborough*, 2 Ohio St. 361; *Hallett v. Hunt*, 7 Ala. 882;

A reference in a deed to a patent of the United States of the same land makes the patent and the survey upon which the patent was issued a part of the deed.<sup>1</sup>

A survey incorporated into a deed by reference controls a description by courses and boundary lines of other land.<sup>2</sup>

The testimony of an experienced surveyor familiar with the land that he had surveyed it many years ago, and found it to correspond with certain maps then in existence, and his further testimony by the aid of those maps that the line was straight, instead of containing a jog as claimed by one of the parties, is admissible although such maps were not shown to be authentic.<sup>3</sup>

**433. The original field-notes and plats of a survey are admissible to identify the land,** or to remove doubts as to the description, without any reference being made to them in the deed.<sup>4</sup> In a case before the Supreme Court of the United States, Mr. Justice Bradley said: "If we had any hesitation on the admissibility of such evidence as a general question, we should be largely influenced in the present case by the decisions of the Supreme Court of the State. . . . In this country a liberal rule on the subject has been adopted in most of the States."<sup>5</sup>

The boundaries of a survey may be located by surrounding surveys referred to in its field-notes, though its corners and lines cannot be found on the ground, and though there is a discrepancy in its area between the field-notes and its boundaries as so located.<sup>6</sup>

*Bland v. Smith* (Tex. Civ. App.), 26 S. W. Rep. 773.

<sup>1</sup> *Miller v. Topeka Land Co.* 44 Kans. 354, 24 Pac. Rep. 420; *Davidson v. Arledge*, 88 N. C. 326; *Powers v. Jackson*, 50 Cal. 429; *Tarpenning v. Cannon*, 28 Kans. 665.

<sup>2</sup> *Hudson v. Irwin*, 50 Cal. 450.

<sup>3</sup> *Wineman v. Grummond*, 90 Mich. 280, 51 N. W. Rep. 509. And see *Burdell v. Taylor*, 89 Cal. 613, 26 Pac. Rep. 1094.

<sup>4</sup> *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. Rep. 201; *Peterson v. Skjelver* (Neb.), 62 N. W. Rep. 43; *Ratliff v. Burleson* (Tex. Civ. App.), 26 S. W. Rep. 1003; *Cook v. Dennis*, 61 Tex. 246; *Stanus v. Smith* (Tex. Civ. App.), 30 S. W. Rep.

262; *Boon v. Hunter*, 62 Tex. 582; *Williams v. Winslow*, 84 Tex. 371, 19 S. W. Rep. 513; *Turner v. Union Pac. Ry. Co.* 112 Mo. 542, 20 S. W. Rep. 673; *Hanson v. Red Rock* (S. D.), 57 N. W. Rep. 11; *Ogilvie v. Copeland*, 145 Ill. 98, 33 N. E. Rep. 1085; *Morrison v. Neff*, 18 Neb. 133; *Disney v. Coal Creek Min. Co.* 11 Lea, 607. A photographic copy of the field-notes of a survey is admissible as bearing on the question whether a certain line was actually measured. *Ayers v. Harris*, 77 Tex. 108, 13 S. W. Rep. 768.

<sup>5</sup> *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. Rep. 201.

<sup>6</sup> *Longoria v. Shaeffer*, 77 Tex. 547, 14 S. W. Rep. 160; *Standlee v. Burkitt*, 78 Tex. 616, 14 S. W. Rep. 1040.

Where the boundaries of a survey cannot be located by its own calls and field-notes, they may be established by the field-notes of adjacent surveys.<sup>1</sup> Where a junior survey was not made on the ground, and the calls are for the surrounding surveys, the lines of such surveys will be the lines of the junior survey.<sup>2</sup>

434. If the field-notes of a survey are inconsistent or uncertain, the true location of the survey may be shown by the testimony of the surveyor who made it.<sup>3</sup> A plat made by such surveyor may be admitted in evidence to explain and illustrate his testimony in regard to the lines and measurements he has made.<sup>4</sup> The surveyor may use such map in explaining his testimony, which would not be clearly intelligible without it, though the plat is not shown to be correct or official.<sup>5</sup>

But if it is apparent on the face of the field-notes that there is a mistake in them, it is not competent for a witness to state that there is such a mistake.<sup>6</sup> This must be determined from the paper itself.

Where objects, natural or artificial, are called for in the field-notes of official surveyors, the presumption is that such objects actually existed<sup>7</sup> at the places indicated by the field-notes.<sup>8</sup> If, however, the survey was a mere chamber survey, the calls for such objects afford but slight evidence of their existence.<sup>9</sup>

435. A corner or boundary well established by marks or monuments controls a description by a map or plat or survey, although this was made contemporaneously with the grant. The map or plat made by the surveyor is admissible in evidence as indicating the location of the survey, but at last the question of boundary is one of fact to be determined by the force and character of the testimony. Looking at the evidence in this way, the conclusion which is the most reasonable and satisfactory is the one to be adopted.<sup>10</sup>

<sup>1</sup> *Adair v. White* (Cal.), 34 Pac. Rep. Rep. 168; *Gunn v. Harris*, 88 Ga. 439, 14 S. E. Rep. 593.

<sup>2</sup> *Kuechler v. Wilson*, 82 Tex. 638, 18 S. W. Rep. 317.

<sup>6</sup> *Coleman v. Smith*, 55 Tex. 254.

<sup>3</sup> *Schley v. Blum*, 85 Tex. 551, 22 S. W. Rep. 264; *Gunn v. Harris*, 88 Ga. 439, 14 S. E. Rep. 593.

<sup>7</sup> *Kuechler v. Wilson*, 82 Tex. 638, 18 S. W. Rep. 317.

<sup>4</sup> *Goldsborough v. Pidduck*, 87 Iowa, 599, 54 N. W. Rep. 431.

<sup>8</sup> *Cadean v. Elliott*, 7 Wash. 205, 34 Pac. Rep. 916.

<sup>5</sup> *Griffith v. Rife*, 72 Tex. 185, 12 S. W.

<sup>9</sup> *Pruner v. Brisbin*, 98 Pa. St. 202.

<sup>10</sup> *Withers v. Connor*, 76 Tex. 185, 13 S. W. Rep. 743, per Collard, J.; *Welder*

Where two corners of a survey can be definitely identified, the courses and distances may be ascertained from the field-notes, and the entire survey constructed therefrom; and in such case the distance and quantity must yield to course.<sup>1</sup>

Where the monuments of the original survey of a town site have been destroyed, the descriptive words in a plat of the town site are controlling as to the location of the town site.<sup>2</sup>

Though the survey be an official one, if the surveyors were directed to establish a beginning corner, and then confine themselves to strict courses and distances, inasmuch as such a direction adopts the most unreliable *indicia* of location and boundaries known to conveyancers, the courts, in locating these surveys, will resort to every kind of evidence that is competent to establish a disputed boundary.<sup>3</sup>

A section corner of a government survey, when shown with certainty, must control even though it is in a different place from that given in the field-notes and plat.<sup>4</sup>

**436.** Where adjoining owners have entered into possession of land according to boundaries marked by stakes, these are monuments which prevail over the courses and distances of a subsequent corrected survey.<sup>5</sup> Subsequent surveys may aid in finding lost corners; but where the old and recognized corners are well known, these must control.<sup>6</sup>

If a purchaser takes possession of the land and fences it soon after the making of a survey, and the person who made the plat pointed out the bounds, it is presumed that his possession was taken according to the lines of the actual survey.<sup>7</sup> It is also competent to establish the lines and courses of a tract of land by showing where the surveyor actually ran when making the survey at

v. Carroll, 29 Tex. 317; New York Land Co. v. Thomson, 83 Tex. 169, 17 S. W. Rep. 920; Montague Co. v. Clay Co. Land Co. 80 Tex. 392, 15 S. W. Rep. 902; Bleidorn v. Pilot Mt. M. Co. 89 Tenn. 166, 204, 15 S. W. Rep. 737; Riley v. Griffin, 16 Ga. 141; Jacobs v. Moseley, 91 Mo. 457, 4 S. W. Rep. 135; Reed v. Marsh, 8 Ohio, 147.

<sup>1</sup> Rand v. Cartwright, 82 Tex. 399, 18 S. W. Rep. 794.

<sup>2</sup> Sperry v. Wesco (Oreg.), 38 Pac. Rep. 623.

<sup>3</sup> Yard v. Ocean Beach, 49 N. J. Eq. 306, 24 Atl. Rep. 729; Scott v. Yard, 46 N. J. Eq. 79, 88, 18 Atl. Rep. 359.

<sup>4</sup> Peterson v. Skjelver (Neb.), 62 N. W. Rep. 43; Woods v. West, 40 Neb. 307, 58 N. W. Rep. 938; Thompson v. Harris, 40 Neb. 230, 58 N. W. Rep. 712.

<sup>5</sup> Jones v. Poundstone, 102 Mo. 240, 14 S. W. Rep. 824.

<sup>6</sup> Hess v. Meyer, 88 Mich. 339, 50 N. W. Rep. 290.

<sup>7</sup> Root v. Cincinnati, 87 Iowa, 202, 54 N. W. Rep. 206.

the instance of the parties to the conveyance, and with a view to its execution.<sup>1</sup>

**437. The plats and surveys made by the United States government cannot be contradicted by parol evidence, or by private surveys and plats.<sup>2</sup> Corners shown to have been originally made by government surveyors are conclusive, and must be accepted as the true corners, no matter how inaccurately they may have been originally established.<sup>3</sup>**

If the corner-stones or other monuments established by the government surveyor can be ascertained as originally located, these control the survey, and the lines shown by the field-notes of the survey must be disregarded.<sup>4</sup> If such a corner is made a starting-point of a description, it will prevail as against an actual survey and a corner fixed by the grantor at the time of the conveyance.<sup>5</sup> Where it is doubtful which of two lines of monuments is the true government line, other things being equal, that one is to be so considered which most nearly conforms to the field-notes.<sup>6</sup>

**438. Where there is a discrepancy in a government survey between the monuments and the distances given in the field-notes, the monuments will control, even though the result**

<sup>1</sup> *Euliss v. McAdams*, 108 N. C. 507, 13 S. E. Rep. 162.

<sup>2</sup> *Bates v. Ill. Cent. R. Co.* 1 Black, 204; *Chapman v. Polack*, 70 Cal. 487, 11 Pac. Rep. 764; *Breen v. Donnelly*, 74 Cal. 301, 15 Pac. Rep. 845; *Spawr v. Johnson*, 49 Kans. 788, 31 Pac. Rep. 664; *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. Rep. 1066; *Jones v. Kimble*, 19 Wis. 429; *Chan v. Brandt*, 45 Minn. 93, 47 N. W. Rep. 461; *Hess v. Meyer*, 73 Mich. 259, 41 N. W. Rep. 422; *Brown v. Morrill*, 91 Mich. 29, 51 N. W. Rep. 700; *Britton v. Ferry*, 14 Mich. 53; *Knight v. Elliott*, 57 Mo. 317; *Turner v. Union Pac. R. Co.* 112 Mo. 542, 20 S. W. Rep. 673; *Campbell v. Clark*, 8 Mo. 553; *Nesselrode v. Parish*, 59 Iowa, 570, 13 N. W. Rep. 746; *Miller v. White*, 23 Fla. 301, 2 So. Rep. 614.

<sup>3</sup> *Liberty v. Burns* (Mo.), 19 S. W. Rep. 1107; *Billingsley v. Bates*, 30 Ala. 376, 68 Am. Dec. 126; *Greer v. Squire* (Wash. St.), 37 Pac. Rep. 545, modifying *Squire v. Greer*, 2 Wash. St. 209, 26 Pac. Rep. 222; *Ayers v. Beaty*, 5 Tex. Civ. App.

491, 24 S. W. Rep. 366; *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. Rep. 1066.

<sup>4</sup> *Cragin v. Powell*, 128 U. S. 697, 9 Sup. Ct. Rep. 203; *Tarpenning v. Cannon*, 28 Kans. 665; *Greer v. Squire* (Wash. St.), 37 Pac. Rep. 545; *Hubbard v. Dusy*, 80 Cal. 281, 22 Pac. Rep. 214; *Nesselrode v. Parish*, 59 Iowa, 570, 13 N. W. Rep. 746; *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. Rep. 1066; *Woods v. West*, 40 Neb. 307, 58 N. W. Rep. 938; *Peter-son v. Skjelver* (Neb.), 62 N. W. Rep. 43; *Thompson v. Harris*, 40 Neb. 230, 58 N. W. Rep. 712; *Johnson v. Preston*, 9 Neb. 474, 4 N. W. Rep. 83; *Bruckner v. Lawrence*, 1 Doug. (Mich.) 19; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Climmer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135; *Beardsley v. Crane*, 52 Minn. 537; *Chan v. Brandt*, 45 Minn. 93, 47 N. W. Rep. 461.

<sup>5</sup> *Powers v. Jackson*, 50 Cal. 429; *Shel-ton v. Bone* (Tex. Civ. App.), 26 S. W. Rep. 26.

<sup>6</sup> *Hubbard v. Dusy*, 80 Cal. 281, 22 Pac. Rep. 214.

be that some of the quarter sections will contain less than their proper number of acres.<sup>1</sup> There is a presumption, however, that the corners were established at the places indicated by the field-notes; and the proof that they were not so established must be clear and convincing where the actual location as claimed does not accord with the section lines in adjoining sections, and will establish the claim in an irregular shape.<sup>2</sup> In relocating lost corners on township lines, when the monuments claimed to be government monuments are disputed and not clearly established, these should be established on a line coinciding with the township line at the points indicated by the government field-notes; that is, on a straight line connecting known and undisputed government monuments on such township line.<sup>3</sup>

Monuments and boundary lines as established by the government survey control the description of lands patented by the United States, and mistakes in the surveys cannot be corrected by the judicial department of the government.<sup>4</sup> If the field-notes of the government survey afford sufficient data for running the lines of that survey, the fact that certain monuments marking the corners of the survey cannot be found does not render the lines unknown or uncertain so that they can be proved by parol evidence.<sup>5</sup>

<sup>1</sup> *Ogilvie v. Copeland*, 145 Ill. 98, 33 N. E. Rep. 1085; *England v. Vandermark* (Ill.), 35 N. E. Rep. 465; *Gordon v. Booker*, 97 Cal. 586, 32 Pac. Rep. 593; *Hubbard v. Dusy*, 80 Cal. 281, 22 Pac. Rep. 214; *Goodman v. Myrick*, 5 Oreg. 65; *Van Dusen v. Shively*, 22 Oreg. 64, 29 Pac. Rep. 76; *Greer v. Squire*, 2 Wash. St. 209, 37 Pac. Rep. 545; *McEvoy v. Loyd*, 31 Wis. 142; *Martin v. Carlin*, 19 Wis. 454, 88 Am. Dec. 696. In *Hall v. Tanner*, 4 Pa. St. 244, it was said: "It has ever been held that the marks on the ground constitute the survey. The courses and distances are only evidences of the survey."

<sup>2</sup> *Cadeau v. Elliott*, 7 Wash. St. 205, 34 Pac. Rep. 916; *Hess v. Meyer*, 73 Mich. 259, 41 N. W. Rep. 422; *Hanson v. Red Rock* (S. D.), 57 N. W. Rep. 11; *Rollins v. Davidson*, 84 Iowa, 237.

<sup>3</sup> *Hanson v. Red Rock* (S. D.), 57 N. W. Rep. 11, per Corson, J.: "It is true that in *McClintock v. Rogers*, 11 Ill. 279

(a leading case), the town line was, by a resurvey, deflected from a straight line between the township corners; but an examination of the case will disclose the fact that that was done to give to the parties the amount of land to which they were entitled, and that the resurvey followed undisputed permanent monuments along the line as established by the original survey and the government field-notes."

<sup>4</sup> *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. Rep. 203. It is very clear, as remarked by the court in *Haydel v. Dufresne*, 17 How. 30, "that great confusion and much litigation would ensue if judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys." *Chan v. Brandt*, 45 Minn. 93, 47 N. W. Rep. 461; *Doolittle v. Bailey*, 85 Iowa, 398, 52 N. W. Rep. 337.

<sup>5</sup> *Pickett v. Nelson*, 79 Wis. 9, 47 N. W. Rep. 936. Surveys from known government corners, both north and south

An original government survey, under which adjoining owners have purchased, governs the boundary between them as against a subsequent survey made many years afterwards under an act of Congress which recited that the town had never been properly surveyed.<sup>1</sup> Where it appears that a purchaser of a part of a government section of land built a fence upon the boundary lines as located by a surveyor at that time, and he testifies that he found the original stake of the government survey and used it as a starting-point, this line will prevail over one surveyed twenty years later, when the corner stake had disappeared.<sup>2</sup>

439. Calls for monuments in the field-notes of a government survey control in relocating the boundaries. Thus, when a patent is issued with boundaries as described in a survey and map made by a government surveyor, who has also made field-notes giving not only courses and distances, but also monuments and the various topographical features of the country, the calls for monuments will control the courses and distances.<sup>3</sup> But incidental calls for monuments, or natural objects noted in field-notes as such in passing, unless specially designated in such manner as to show an intention to make them locative, are not such calls as will ordinarily have precedence over calls for courses and distances.<sup>4</sup>

An actual survey established by evidence controls course and distance.<sup>5</sup> The monuments of the original survey control if these can be found, or the places where they were established can be ascertained.<sup>6</sup>

A house referred to in the field-notes of a survey, and marked

and east and west of the corner in dispute, by which the corner is located on a line with other corners on both of said lines, and each landowner is thereby given the full amount of land called for by his patent, are preferred to a survey which was not begun at a known government corner, and lacked many of the elements of certainty, and which gave one of the landowners much more than he was entitled to under his patent, and the other less. *Woods v. West*, 40 Neb. 307, 58 N. W. Rep. 938, 37 Neb. 400, 56 N. W. Rep. 30.

<sup>1</sup> *Burt v. Busch*, 82 Mich. 506, 46 N. W. Rep. 790.

<sup>2</sup> *Carpenter v. Monks*, 81 Mich. 103, 45 N. W. Rep. 477.

<sup>3</sup> *Tognazzini v. Morganti*, 84 Cal. 159, 23 Pac. Rep. 1085.

<sup>4</sup> *Hanson v. Red Rock* (S. Dak.), 57 N. W. Rep. 11; *Randall v. Burk Tp.* (S. Dak.) 57 N. W. Rep. 4; *Jones v. Andrews*, 72 Tex. 5, 9 S. W. Rep. 170.

<sup>5</sup> *Graham v. Dewees*, 85 Tex. 395, 20 S. W. Rep. 127.

<sup>6</sup> *McAninch v. Freeman*, 69 Tex. 445, 4 S. W. Rep. 369; *Miner v. Brader*, 65 Wis. 537, 27 N. W. Rep. 313; *Pruner v. Brisbin*, 98 Pa. St. 202.



upon a map, becomes a monument as much as a tree or a stake.<sup>1</sup>

**440.** Courses and distances control the lines of a survey in the absence of calls for natural or artificial monuments or lines,<sup>2</sup> or in case the monuments cannot be found,<sup>3</sup> or in case the survey was erroneous.<sup>4</sup>

The courses and distances of a disputed survey prevail over the courses and distances of adjacent surveys.<sup>5</sup>

**441.** If the original government survey is shown with certainty, a purchaser of a subdivision of such survey takes by that survey, and calls in his deed inconsistent with such survey must yield to it.<sup>6</sup>

Where the line of an older survey is given as a boundary, but the distance given in the course towards the survey will not carry the land to the line thereof, the survey line will control.<sup>7</sup>

But in a conflict between two surveys, the later of which was not made on the ground, but in the office of the surveyor from his memory of the former survey, calls for certain trees as an established corner must yield to the earlier survey.<sup>8</sup>

A deed of a lot by number conveys the lot as it is bounded by the lines actually run by the survey, when they can be ascertained.<sup>9</sup>

**442.** The original survey may be traced backward as well as forward.<sup>10</sup> It is well settled that in running the line of a survey of public lands in one direction, if a difficulty is met with,

<sup>1</sup> *Wise v. Burton*, 73 Cal. 166, 174, 14 Pac. Rep. 678, 683.

<sup>2</sup> *Ratliffe v. Burleson* (Tex. Civ. App.), 25 S. W. Rep. 983, 26 S. W. Rep. 1003; *Layton v. New York Land Co.* (Tex. Civ. App.) 29 S. W. Rep. 1120.

<sup>3</sup> *Tippen v. McCampbell* (Tex. Civ. App.), 26 S. W. Rep. 647.

<sup>4</sup> *Aransas Pass. Co. v. Flippen* (Tex. Civ. App.), 29 S. W. Rep. 813; *Kuechler v. Wilson*, 82 Tex. 638, 644, 18 S. W. Rep. 317; *Reast v. Donald*, 84 Tex. 648, 651, 19 S. W. Rep. 795; *Gregg v. Hill*, 82 Tex. 405, 409, 17 S. W. Rep. 838.

<sup>5</sup> *Tippen v. McCampbell* (Tex. Civ. App.), 26 S. W. Rep. 647.

<sup>6</sup> *Shelton v. Bone* (Tex. Civ. App.), 26 S. W. Rep. 224; *Smith v. Boone*, 84 Tex. 526, 19 S. W. Rep. 702; *Wa-*

*trous v. Morrison*, 33 Fla. 261, 14 So. Rep. 805.

<sup>7</sup> *Worsham v. Chisum* (Tex. Civ. App.), 28 S. W. Rep. 905; *Worsham v. Morgan* (Tex. Civ. App.), 28 S. W. Rep. 918; *Williams v. Beckham* (Tex. Civ. App.), 26 S. W. Rep. 652.

<sup>8</sup> *Fenley v. Flowers*, 5 Tex. Civ. App. 191, 23 S. W. Rep. 749; *Shelton v. Bone* (Tex. Civ. App.), 26 S. W. Rep. 224. And see *Wyatt v. Duncan* (Tex. Civ. App.), 22 S. W. Rep. 665.

<sup>9</sup> *Root v. Cincinnati*, 87 Iowa, 202, 54 N. W. Rep. 206; *Ufford v. Wilkins*, 33 Iowa, 110.

<sup>10</sup> *Coburn v. Coxeter*, 51 N. H. 158; *Curtis v. Aaronson*, 49 N. J. L. 68, 72, 7 Atl. Rep. 886; *Fuller v. Carr*, 33 N. J. L. 157; *Ellinwood v. Stancliff*, 42 Fed. Rep. 316.

and all the known calls of the survey are met by running them in the reverse direction, this may properly be done.<sup>1</sup> The beginning corner of a survey is of no higher dignity than any other corner.<sup>2</sup> But it is true nevertheless that "the natural order of survey is that which the deed shows the parties to the deed adopted to identify, to their own satisfaction, the land intended to be conveyed by the one to the other. It may be considered as their direction how the identity shall be established by survey at any future time, and it supposes certain points as the beginning to be established. If, therefore, the description of a particular line be complete in itself, the court cannot vary from that description because it will not correspond with the description of a posterior line, unless the description of the latter be more specific than the former, and unless from the latter a mistake in the former can be clearly inferred."<sup>3</sup>

In locating an intermediate monument on a survey which was run also by courses and distances, the footsteps of the surveyor should be followed, instead of taking a reverse course.<sup>4</sup>

**443. The actual beginning corner, if this can be ascertained, must control in locating original surveys;** yet when a survey is made upon paper, and not upon the ground, the intention of the parties making the survey should control. This intention is to be ascertained by all the facts and circumstances connected with the case.<sup>5</sup>

The question of the location of a starting-point of a survey is one of fact for the jury, and not one of theory to be determined finally upon the opinion of surveyors or experts. Their opinion

<sup>1</sup> *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. Rep. 201; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, per Fuller, C. J.; *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. Rep. 161; *Ayers v. Harris*, 64 Tex. 296; *Ayers v. Lancaster*, 64 Tex. 305; *Swenson v. Willsford*, 84 Tex. 424, 19 S. W. Rep. 613; *Miles v. Sherwood*, 84 Tex. 485, 19 S. W. Rep. 853; *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. Rep. 349; *Simpkins v. Wells* (Ky.), 26 S. W. Rep. 587; *Edson v. Knox*, 8 Wash. 642, 36 Pac. Rep. 698.

<sup>2</sup> *Miles v. Sherwood*, 84 Tex. 485, 19 S.

W. Rep. 853. And see *Reast v. Donald*, 84 Tex. 648, 19 S. W. Rep. 795; *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. Rep. 161.

<sup>3</sup> *Harry v. Graham*, 1 Dev. & B. 76, 79, 27 Am. Dec. 226; *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. Rep. 349; *Redmond v. Stepp*, 100 N. C. 212, 6 S. E. Rep. 727.

<sup>4</sup> *Blackburn v. Nelson*, 100 Cal. 336, 34 Pac. Rep. 775.

<sup>5</sup> *Ocean Beach Asso. v. Yard*, 48 N. J. Eq. 72, 20 Atl. Rep. 763; *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. Rep.

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as to the location of a corner post by a survey made more than forty years before is inadmissible.<sup>1</sup>

Testimony of a civil engineer that he had taken pains to establish the correctness of a stake designating a section corner; that he knew it to be approximately the location of the original section corner; that he had used the stake so frequently with reference to other surveys that he was perfectly sure of its correctness; and that, if it were not correct, the streets would all be thrown out of line, — is sufficient to warrant the admission of a survey the starting-point of which was the stake alluded to, as against an objection that such point had not been located.<sup>2</sup>

**444. Detached and block surveys.** — If a tract is part of a block, it must be so located, and can be located in no other way. If it is a separate survey, it must be located by its own monuments, aided, if need be, by the legal presumption that the lines were run as returned. Where the lines which inclose four surveys in the interior of a block of surveys are marked on the ground by interior lines of the block and by lines peculiar to the four surveys, the lines which separate them from each other cannot be located by marks on the lines which inclose the block. If marks of the original survey are found on three sides of a tract, and some of these marks are peculiar to the tract, and are not common to the other tracts alleged to form part of the block, an individual or separate location is established.<sup>3</sup>

**445. Distribution of variance.** — Where, on a line of the same survey and between remote corners, the whole length is found to be variant from the length called for, it is not to be presumed that the variance was caused from a defective survey in any part, but it must be presumed, in the absence of circumstances showing the contrary, that it arose from an imperfect measurement of the whole line, and such variance must be distributed between the several subdivisions of the line in proportion to their respective lengths.<sup>4</sup> Thus, where a piece of land is subdivi-

<sup>1</sup> *Burt v. Busch*, 82 Mich. 506, 46 N. W. Rep. 790; *Stewart v. Carleton*, 31 Mich. 270; *Gregory v. Knight*, 50 Mich. 63, 14 N. W. Rep. 700; *Lemon v. Railway Co.*, 59 Mich. 618, 623, 26 N. W. Rep. 791; *Randall v. Gill*, 77 Tex. 351, 14 S. W. Rep. 134.

<sup>2</sup> *Manistee Manuf. Co. v. Cogswell* (Mich.), 61 N. W. Rep. 884.

<sup>3</sup> *Ferguson v. Bloom*, 144 Pa. St. 549, 23 Atl. Rep. 49.

<sup>4</sup> *James v. Drew*, 68 Miss. 518, 9 So. Rep. 293; *Westphal v. Schultz*, 48 Wis. 75, 4 N. W. Rep. 136; *Pereles v. Magoon*, 78 Wis. 27, 46 N. W. Rep. 1047; *Eshle-*

vided into lots and a plat of the subdivision recorded, and the actual aggregate frontage of such lots is less than is called for in the plat, the deficiency must be divided among the several lots in proportion to their respective frontage as indicated by the plat.<sup>1</sup>

The same principle maintains where the actual measurements are in excess of the dimensions specifically designated upon the plat, as in case of a deficiency.<sup>2</sup>

Where in a platted block the lots are marked on the plat as having the same number of front feet each, except one, the specific dimensions of which are also marked, and a survey shows that the whole block contains more front feet than are marked on the plat, the excess must be distributed between all the lots, and not given to that lot only which differed in its dimensions from the rest.<sup>3</sup>

**446.** Where the description of land in a deed calls for a legal subdivision of a section of surveyed land, the quarter-section corners being lost and the section exceeding six hundred and forty acres in area, the division lines of the fractions of the section are determined by a division *pro rata* of the lines of the section as they appear upon the ground.<sup>4</sup>

But where a tract of land was platted into many lots, all but two of which were of a uniform width of twenty-five feet, and two were irregular, containing the remnant of the tract, but the tract was too small to leave the two irregular lots as wide as they appeared upon the plat, it was held that the regular lots were entitled to the full size as platted, and that the width of the irregular lots must be diminished.<sup>5</sup>

**447.** A space left between two surveys made at the same time by the same surveyor, calling for each other, will be ap-

man v. Malter, 101 Cal. 233, 35 Pac. Rep. 860; Miller v. Topeka Land Co. 44 Kans. 354, 24 Pac. Rep. 420; Caylor v. Luzader (Ind.), 36 N. E. Rep. 909.

<sup>1</sup> Miller v. Topeka Land Co. 44 Kans. 354, 24 Pac. Rep. 420; McAlpine v. Reicheneker, 27 Kans. 257; Newcomb v. Lewis, 31 Iowa, 488; Moreland v. Page, 2 Iowa, 139; O'Brien v. McGrane, 27 Wis. 446; Jones v. Kimble, 19 Wis. 429; Westphal v. Schultz, 48 Wis. 78, 4 N. W. Rep. 136; Francois v. Maloney, 56 Ill. 399; Martz v. Williams, 67 Ill. 306; Parks v.

Boynton, 98 Pa. St. 370; Reimers v. Quinnin, 49 Mich. 449, 13 N. W. Rep. 813.

<sup>2</sup> Miller v. Land Co. 44 Kans. 354, 24 Pac. Rep. 420; Witham v. Cutts, 4 Greenl. 31; Wolfe v. Scarborough, 2 Ohio St. 361; McAlpine v. Reicheneker, 27 Kans. 257.

<sup>3</sup> Pereles v. Magoon, 78 Wis. 27, 46 N. W. Rep. 1047.

<sup>4</sup> Eshleman v. Malter, 101 Cal. 233, 35 Pac. Rep. 860; Miller v. Land Co. 44 Kans. 354, 24 Pac. Rep. 420.

<sup>5</sup> Baldwin v. Shannon, 43 N. J. L. 596.

portioned to the owners of the tracts in proportion to their respective interests, in case no boundary line was fixed on the ground.<sup>1</sup> This rule presupposes that the other corners of the surveys are fixed and certain. In case there is no defined line between the two surveys, and a common boundary is not reached by running from the established corners towards the boundary of the two surveys by course and distance, though there was a manifest mistake in the distance, there is no rule of law which, in the absence of evidence, would raise a presumption against or in favor of either survey.<sup>2</sup>

### VII. *Boundary by Highway.*

**448.** It is an established rule that a conveyance of land bounded by or along an existing way, whether public or private, carries the title to the centre of the way, subject, of course, to the public use of it as a highway, unless there be something showing an intent to the contrary.<sup>3</sup> The intent is to be

<sup>1</sup> *Ware v. McQuinn* (Tex. Civ. App.), 26 S. W. Rep. 126.

<sup>2</sup> *Duff v. Moore*, 68 Tex. 270, 4 S. W. Rep. 530.

<sup>3</sup> *Berridge v. Ward*, 10 Com. B. N. S. 400; *Grose v. West*, 7 Taunt. 39; *Steel v. Prickett*, 2 Stark, 463, 468; *O'Connor v. Nova Scotia Tel. Co.* 22 Can. Sup. 276; *Banks v. Ogden*, 2 Wall. 57. **Alabama**: *Moore v. Johnston*, 87 Ala. 220, 6 So. Rep. 50; *Columbus & W. Ry. Co. v. Witherow*, 82 Ala. 190, 3 So. Rep. 23. **Arkansas**: *Taylor v. Armstrong*, 24 Ark. 102. **California**: Civil Code, § 1112. *Moody v. Palmer*, 50 Cal. 31; *Webber v. Cal. & O. R. R. Co.* 51 Cal. 425; *Watkins v. Lynch*, 71 Cal. 21, 11 Pac. Rep. 808; *Fraser v. Ort*, 95 Cal. 661, 30 Pac. Rep. 793. **Connecticut**: *Champlin v. Pendleton*, 13 Conn. 23; *Gear v. Barnum*, 37 Conn. 229; *Chatham v. Brainard*, 11 Conn. 60; *Watrous v. Southworth*, 5 Conn. 305; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216. **Florida**: *Jacksonville, &c. Ry. Co. v. Lockwood*, 33 Fla. 573, 15 So. Rep. 327. **Georgia**: *Silvey v. McCool*, 86 Ga. 1, 12 S. E. Rep. 175. **Idaho**: R. S. 1887, § 2934. **Illinois**: *Helmer v. Castle*, 109 Ill. 664;

*Canal Trustees v. Havens*, 11 Ill. 554; *Henderson v. Hatterman*, 146 Ill. 555, 34 N. E. Rep. 1041. **Indiana**: *Cox v. Louisville, N. A. & C. R. R. Co.* 48 Ind. 178; *Terre Haute, &c. R. Co. v. Scott*, 74 Ind. 29; *Terre Haute, &c. R. Co. v. Rodel*, 89 Ind. 128; *Hamilton Co. v. Indianapolis Nat. Gas Co.* 134 Ind. 209; *Haslett v. New Albany, &c. R. Co.* 7 Ind. App. 603, 34 N. E. Rep. 845; *Montgomery v. Hines*, 134 Ind. 221, 33 N. E. Rep. 1100; *Warbritton v. Demorett*, 129 Ind. 346, 27 N. E. Rep. 730. **Kansas**: *Tousley v. Galena, M. & S. Co.* 24 Kans. 328. **Kentucky**: *Hawesville v. Lander*, 8 Bush, 679; *Jacob v. Woolfolk*, 90 Ky. 426, 14 S. W. Rep. 415. **Maine**: *Low v. Tibbetts*, 72 Me. 92, 39 Am. Rep. 303; *Oxton v. Graves*, 68 Me. 371, 28 Am. Rep. 75; *Johnson v. Anderson*, 18 Me. 76; *Bucknam v. Bucknam*, 12 Me. 463; *Sutherland v. Jackson*, 32 Me. 80; *Cottle v. Young*, 59 Me. 105. **Maryland**: Laws 1892, ch. 684, unless the grantor shall in express terms in writing reserve all title to the street to himself. *Baltimore & O. R. R. Co. v. Gould*, 67 Md. 60, 8 Atl. Rep. 754; *Peabody Heights Co. v. Sadtler*, 63 Md. 533, 52 Am. Rep. 519; *Gump v. Sibley* (Md.), 28 Atl.

gathered from the description, in connection with other parts of the grant, and by reference to the situation of the land, and the relation of the parties to the land conveyed and to other adjacent

- Rep. 977; *Foreman v. Presbyterian Asso.* (Md.) 30 Atl. Rep. 1114; *Hunt v. Brown*, 75 Md. 481, 23 Atl. Rep. 1029; *Albert v. Thomas*, 73 Md. 181, 20 Atl. Rep. 912; *Rieman v. Baltimore Belt R. Co.* (Md.) 31 Atl. Rep. 444. **Massachusetts**: *Gould v. Eastern R. R.* 142 Mass. 85, 7 N. E. Rep. 543; *Dean v. Lowell*, 135 Mass. 55; *Motley v. Sargent*, 119 Mass. 231; *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Peck v. Denniston*, 121 Mass. 17; *Fisher v. Smith*, 9 Gray, 441; *White v. Godfrey*, 97 Mass. 472; *Sanborn v. Rice*, 129 Mass. 387; *Dodd v. Witt*, 139 Mass. 63, 29 N. E. Rep. 475; *Clark v. Parker*, 106 Mass. 554; *O'Connell v. Bryant*, 121 Mass. 557; *Boston v. Richardson*, 13 Allen, 1116, overruling *Tyler v. Hammond*, 11 Pick. 193; *Sibley v. Holden*, 10 Pick. 249, 251, 20 Am. Dec. 521. **Michigan**: *Purkiss v. Benson*, 28 Mich. 538. **Minnesota**: *In re Robbins*, 34 Minn. 99, 24 N. W. Rep. 356, 57 Am. Rep. 40; *Rich v. City of Minneapolis*, 37 Minn. 423, 35 N. W. Rep. 2; *Ellsworth v. Lord*, 40 Minn. 337, 42 N. W. Rep. 389; *Lamm v. Railway Co.* 45 Minn. 71, 47 N. W. Rep. 455; *Gilbert v. Emerson* (Minn.), 61 N. W. Rep. 820. **Missouri**: *Snoddy v. Bolen* (Mo.), 25 S. W. Rep. 932. **New Hampshire**: *Reed's Petition*, 13 N. H. 381; *Woodman v. Spencer*, 54 N. H. 507; *McShane v. Main*, 62 N. H. 4. **New Jersey**: *Ayres v. Penn. Ry. Co.* 52 N. J. L. 405, 20 Atl. Rep. 54; *Salter v. Jonas*, 39 N. J. L. 469, 23 Am. Rep. 229; *Dodge v. Penn. R. R. Co.* 43 N. J. Eq. 351, 11 Atl. Rep. 751. **New York**: *Hennessy v. Murdock*, 137 N. Y. 317, 33 N. E. Rep. 330; *Matter of Ladue*, 118 N. Y. 213, 219, 23 N. E. Rep. 465; *Wallace v. Fee*, 50 N. Y. 694; *Dunham v. Williams*, 37 N. Y. 251; *Wager v. Troy, &c. R. Co.* 25 N. Y. 526; *Perrin v. Railroad Co.* 36 N. Y. 120; *Bissell v. New York Cent. R. R. Co.* 23 N. Y. 61; *Jackson v. Louw*, 12 Johns. 252; *Jackson v. Hathaway*, 15 Johns. 447; *Story v. N. Y. Elevated R. Co.* 90 N. Y. 122, 180, 43 Am. Rep. 146; *Greer v. N. Y. Cent. & H. R. R. Co.* 37 Hun, 346; *Lozier v. N. Y. Cent. R. Co.* 42 Barb. 465; *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. Rep. 1047; *McCrudden v. Rochester Ry. Co.* 5 Misc. Rep. 59, 25 N. Y. Supp. 114, affirmed 28 N. Y. Supp. 1135; *Cochran v. Smith*, 73 Hun, 597, 26 N. Y. Supp. 103; *Pollock v. Morris*, 19 J. & S. 112; *White's Bank v. Nichols*, 64 N. Y. 65; *Mott v. Mott*, 68 N. Y. 246; *Dunham v. Williams*, 37 N. Y. 251; *Sherman v. McKeon*, 38 N. Y. 266; *Hammond v. McLachlan*, 1 Sandf. 323; *In re Ladue*, 118 N. Y. 213, 23 N. E. Rep. 465. **North Dakota**: *Comp. Laws* 1887, § 3252. **Pennsylvania**: *Herbert v. Rainey*, 54 Fed. Rep. 248, 250; *Ott v. Kreiter*, 110 Pa. St. 370; *Cox v. Freedley*, 33 Pa. St. 124, 75 Am. Dec. 584; *Paul v. Carver*, 26 Pa. St. 223, 67 Am. Dec. 413; *Transue v. Sell*, 105 Pa. St. 604; *Flick's Est.* 6 Kulp, 329; *Trutt v. Spotts*, 87 Pa. St. 339; *Falls v. Reis*, 74 Pa. St. 439; *Spackman v. Steidel*, 88 Pa. St. 453; *Dobson v. Hohenadel*, 148 Pa. St. 367, 23 Atl. Rep. 1128; *Firmstone v. Spaeter*, 150 Pa. St. 616, 25 Atl. Rep. 41, 30 W. N. C. 570; *Lotz v. Reading Iron Co.* 10 Pa. Co. Ct. 497; *Kohler v. Kleppinger* (Pa.), 5 Atl. Rep. 750. **Rhode Island**: *Healey v. Babbitt*, 14 R. I. 533; *Anthony v. Providence* (R. I.), 28 Atl. Rep. 766. **South Dakota**: *Comp. Laws* 1887, § 3252. **Vermont**: *Marsh v. Burt*, 34 Vt. 289; *Morrow v. Willard*, 30 Vt. 118; *Maynard v. Weeks*, 41 Vt. 617; *Church v. Stiles*, 59 Vt. 642, 10 Atl. Rep. 674. **Wisconsin**: *Kimball v. Kenosha*, 4 Wis. 321, 331; *Milwaukee v. Milwaukee & Beloit R. R. Co.* 7 Wis. 85; *Jarstadt v. Morgan*, 48 Wis. 245, 4 N. W. Rep. 27; *Gove v. White*, 20 Wis. 425; *Andrews v. Youmans*, 78 Wis. 56, 47 N. W. Rep. 304.

lands; and, if an intent to exclude the highway appears by the terms of the grant as interpreted by the surrounding circumstances, the title does not pass.<sup>1</sup> The intent to convey to the middle line of the highway arises from the presumption that the adjoining owners originally furnished the land for a right of way in equal proportions; and from the further presumption that such owner, in selling land bounded upon the highway, intended to sell to the centre line of the street, and not to retain a narrow strip which could hardly be of use or value except to the owner of the adjoining land.<sup>2</sup>

Various reasons are given for the rule, as that "the way was taken out of the party that hath other lands adjoining,"<sup>3</sup> and that the owner of the land laid out in lots and streets gets his pay for the streets in the increased value of the lots,<sup>4</sup> and so purchasers, one after another, pay for the street in paying for the lots.<sup>5</sup> The rule is the same whether applied to the streets of a city or to the highways in the country.<sup>6</sup>

**449.** This rule is generally applied equally to boundaries by public and by private ways and alleys.<sup>7</sup> Thus, in case land

<sup>1</sup> *White's Bank v. Nichols*, 64 N. Y. 65; *Mott v. Mott*, 68 N. Y. 246; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Dexter v. Riverside, &c. Mills*, 15 N. Y. Supp. 374, per Martin, J.; *Baltimore & O. R. R. Co. v. Gould*, 67 Md. 60, 8 Atl. Rep. 754.

<sup>2</sup> *In re Robbins*, 34 Minn. 99, 24 N. W. Rep. 356, 57 Am. Rep. 40; *Matter of Ladue*, 118 N. Y. 213, 219, 23 N. E. Rep. 465; *Dunham v. Williams*, 37 N. Y. 251; *Salter v. Jonas*, 39 N. J. L. 469, 23 Am. Rep. 229; *Henderson v. Hatterman*, 146 Ill. 555, 34 N. E. Rep. 1041.

<sup>3</sup> *Holmes v. Bellingham*, 7 C. B. N. S. 329; *Healey v. Babbitt*, 14 R. I. 533; *Church v. Meeker*, 34 Conn. 421; *Stiles v. Curtis*, 4 Day, 328, 333; *Dunham v. Williams*, 37 N. Y. 251; *Jacksonville, &c. Ry. Co. v. Lockwood*, 33 Fla. 573, 15 So. Rep. 327.

<sup>4</sup> *Paul v. Carver*, 26 Pa. St. 223.

<sup>5</sup> *Anthony v. Providence (R. I.)*, 28 Atl. Rep. 766, per Stiness, J.

<sup>6</sup> *Bissell v. N. Y. Cent. R. R. Co.* 23 N. Y. 61; *Taylor v. Armstrong*, 24 Ark. 102.

<sup>7</sup> *Holmes v. Bellingham*, 7 C. B. N. S. 329; *Gould v. Eastern R. R. Co.* 142 Mass. 85, 7 N. E. Rep. 543; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Fisher v. Smith*, 9 Gray, 441; *Motley v. Sargent*, 119 Mass. 231; *Peck v. Denniston*, 121 Mass. 17; *Boland v. St. John's Schools (Mass.)*, 39 N. E. Rep. 1035; *Matter of Ladue*, 118 N. Y. 213; *Hennessy v. Murdock*, 137 N. Y. 317, 33 N. E. Rep. 330; *Story v. N. Y. Elevated R. Co.* 90 N. Y. 122, 165, 43 Am. Rep. 146; *White's Bank v. Nichols*, 64 N. Y. 65; *Gear v. Barnum*, 37 Conn. 229; *Anthony v. Providence (R. I.)*, 28 Atl. Rep. 766; *Albert v. Thomas*, 73 Md. 181, 20 Atl. Rep. 912; *Moore v. Johnston*, 87 Ala. 220, 6 So. Rep. 50; *Cincinnati & Ga. R. v. Mims*, 71 Ga. 240; *Jacob v. Woolfolk (Ky.)*, 14 S. W. Rep. 415; *Schneider v. Jacob (Ky.)*, 5 S. W. Rep. 350; *Hawesville v. Lander*, 8 Bush, 679. That the rule does not apply to private streets, see *Sutherland v. Jackson*, 32 Me. 80; *Spackman v. Steidel*, 88 Pa. St. 453; *Transue v. Sell*, 105 Pa. St. 604.

is laid out in blocks and lots as represented on a map or plat, and lots are sold bounded upon the projected streets, the deed passes the fee to the centre of the street adjoining such land.<sup>1</sup> The grantor in such case is regarded as dedicating the ways to use as streets or ways, so far as his grantees are concerned, and he is not allowed afterwards to say they are not streets or ways. His deed thus operates not only to create a street, but also, through the presumption arising from the fact that there is a street, to extend the grant to its centre.<sup>2</sup> A boundary of a lot upon a private way, whether defined by the deed or shown upon a recorded plan, implies the existence of such way for the use of the grantee, and the grantor is estopped, as to the grantee and all claiming under him, from denying the existence of such way, or of any connecting ways shown upon the plan, over land of the grantor, which enable the

<sup>1</sup> *Jarstadt v. Morgan*, 48 Wis. 245, 4 N. W. Rep. 27; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Tufts v. Charlestown*, 2 Gray, 271; *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157; *Livingston v. New York*, 8 Wend. 85, 22 Am. Dec. 622; *Hennessy v. Murdock*, 137 N. Y. 317, 33 N. E. Rep. 330; *Thomas v. Poole*, 7 Gray, 83; *Guthrie v. New Haven*, 31 Conn. 308; *Kittle v. Pfeiffer*, 22 Cal. 484; *Rowan v. Portland*, 8 B. Mon. 232; *Davis v. Judge*, 46 Vt. 655; *Garstang v. Davenport (Iowa)*, 57 N. W. Rep. 876; *Winter v. Payne*, 33 Fla. 470, 15 So. Rep. 211, 213; *Rogers v. Bollinger (Ark.)*, 26 S. W. Rep. 12.

<sup>2</sup> *Banks v. Ogden*, 2 Wall. 57; *Herbert v. Rainey*, 54 Fed. Rep. 248. **California**: *Currier v. Howes*, 103 Cal. 431, 37 Pac. Rep. 521; *Stone v. Brooks*, 35 Cal. 489; *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. Rep. 839. **Michigan**: *Plumer v. Johnston*, 63 Mich. 165, 29 N. W. Rep. 687. **Minnesota**: *Hurley v. Miss. Rum River Boom Co.* 34 Minn. 143, 24 N. W. Rep. 917. **Missouri**: *Stewart v. Perkins*, 110 Mo. 660, 19 S. W. Rep. 989. In *McShane v. City of Moberly*, 79 Mo. 41, it was ruled that no one but the absolute owner of the land can dedicate land to a public use so as to pass the fee, and that the dedication of land upon which there

is a deed of trust is subject to be avoided by a sale under the deed. **New Jersey**: *White v. Tide-Water Oil Co.* 50 N. J. Eq. 1, 25 Atl. Rep. 199; *Prudden v. Railroad Co.* 19 N. J. Eq. 386, 391, 20 N. J. Eq. 535; *Booraem v. Railroad Co.* 40 N. J. Eq. 557, 5 Atl. Rep. 106. In *Dodge v. Railroad Co.* 43 N. J. Eq. 351, 11 Atl. Rep. 751, affirmed on appeal, 45 N. J. Eq. 366, 19 Atl. Rep. 622, Vice-Chancellor Van Fleet states it to be established that, where land is conveyed as abutting on a proposed street, before a public highway in fact exists there, and a way over such proposed street is essential to the beneficial enjoyment of the land granted, or even a desirable accessory to it, the implication is that, until the proposed street becomes an actual highway, the grantee shall have the use of it as a means of passage to and from his land. The principle of these cases is also recognized and applied in *Dill v. Board*, 47 N. J. Eq. 421, 20 Atl. Rep. 739; *McShane v. City of Moberly*, 79 Mo. 41. **New York**: *Bissell v. New York Cent. R. Co.* 23 N. Y. 61; *In re Ladue*, 118 N. Y. 213; *Story v. N. Y. Elev. R. Co.* 90 N. Y. 122, 165, 43 Am. Rep. 146. **Oregon**: *Meier v. Railway Co.* 16 Oreg. 500, 19 Pac. Rep. 610; *Hicklin v. McClellan*, 18 Oreg. 126, 22 Pac. Rep. 1057. **Pennsylvania**: *Ferguson's Appeal*, 117 Pa. St. 426, 11 Atl. Rep. 885.



grantee to reach the public highways in any direction.<sup>1</sup> Where a plat of land is recorded, and land appears thereon bounded by lines clearly intended to represent the lines of a street, and lots are sold as being bounded on such street, such land is dedicated for a public street, though not named as such on the plat.<sup>2</sup> As to the grantee in such case, the way shown upon the plat is a street, and it makes no difference whether it has been opened or not.<sup>3</sup>

The rule is the same even when the land is laid out and sold by an attorney in fact. If, having unrestricted power to sell the land, he plats the same and sells all of the lots by numbers, the fee in the streets of the plat passes to the grantee, whether the attorney had power to dedicate the streets to the public or not.<sup>4</sup>

450. In case of sales by plats, there is an implied covenant that the abutting streets or ways are or will be laid out as described, that they are of the width represented, and that the grantor will do nothing to defeat or impair the right of way conveyed to the grantee.<sup>5</sup>

<sup>1</sup> **Massachusetts:** *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Boland v. St. John's Schools* (Mass.), 39 N. E. Rep. 1035; *Rodgers v. Parker*, 9 Gray, 445; *Clark v. Parker*, 106 Mass. 554; *Walker v. Boynton*, 120 Mass. 349; *Walker v. Worcester*, 6 Gray, 548; *Thomas v. Poole*, 7 Gray, 83; *Loring v. Otis*, 7 Gray, 563; *Salisbury v. Andrews*, 19 Pick. 250; *Tufts v. Charlestown*, 2 Gray, 271; *Lincoln v. Shaw*, 17 Mass. 410; *Parker v. Bennett*, 11 Allen, 388. See *Brainard v. Boston & N. Y. Cent. R. Co.* 12 Gray, 407. **Indiana:** *Cox v. Louisville, &c. R. Co.* 48 Ind. 178. **Michigan:** *Smith v. Lock*, 18 Mich. 56; *White v. Smith*, 37 Mich. 291. **New Jersey:** *Hopkinson v. McKnight*, 31 N. J. L. 422. **New York:** *White's Bank v. Nichols*, 64 N. Y. 65; *Matter of Opening of Eleventh Av.* 81 N. Y. 436. **Pennsylvania:** *Transue v. Sell*, 105 Pa. St. 604. **Wisconsin:** *Weisbrod v. Chicago & N. W. Ry. Co.* 18 Wis. 35, 86 Am. Dec. 743; *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 1 N. W. Rep. 63; *Pettibone v. Hamilton*, 40 Wis. 402.

<sup>2</sup> *San Francisco v. Burr* (Cal.), 36 Pac. Rep. 771.

<sup>3</sup> *Bissell v. N. Y. Cent. R. Co.* 23 N. Y. 61; *Dobson v. Hohenadel*, 148 Pa. St. 367, 23 Atl. Rep. 1128; *Anthony v. Providence* (R. I.), 28 Atl. Rep. 766.

<sup>4</sup> *Anthony v. Providence* (R. I.), 28 Atl. Rep. 766.

<sup>5</sup> *Banks v. Ogden*, 2 Wall. 57; *Merrill v. Newton*, 99 Mich. 226, 58 N. W. Rep. 70; *Capen v. Stevens*, 29 Mich. 496; *Molitor v. Sheldon*, 37 Kans. 246, 15 Pac. Rep. 231; *Guthrie v. New Haven*, 31 Conn. 308; *Thomas v. Poole*, 7 Gray, 83; *Gould v. Railroad Co.* 142 Mass. 85, 7 N. E. Rep. 543; *Clark v. Parker*, 106 Mass. 554; *Kittle v. Pfeiffer*, 22 Cal. 484; *Henneasy v. Murdock*, 137 N. Y. 317, 33 N. E. Rep. 330; *Livingston v. New York*, 8 Wend. 85, 22 Am. Dec. 622; *Davis v. Judge*, 46 Vt. 655; *Winter v. Payne*, 33 Fla. 470; *Rowan v. Portland*, 8 B. Mon. 232; *Snoddy v. Bolen*, 122 Mo. 479, 25 S. W. Rep. 932; *Jarstadt v. Morgan*, 48 Wis. 245, 4 N. W. Rep. 27; *Weisbrod v. Railroad Co.* 18 Wis. 35; *Cox v. Railroad Co.* 48 Ind. 178; *Baltimore & O. R. Co. v. Gould*, 67 Md. 60, 63, 8 Atl. Rep. 734; *Hall v. Baltimore*, 56 Md. 187; *White v.*

But the purchaser of a lot according to a plat showing a street immediately adjoining, even if the fee of the street to the centre thereof is conveyed to him, acquires only an easement in the street, and cannot take possession of any part thereof, and exclude therefrom the vendor, who has lots on the other side of the street, though the street has not been accepted as a public street.<sup>1</sup>

451. But such a sale is not strictly a dedication of the streets indicated on such plat to the public for use as highways.<sup>2</sup> The acts and declarations of the owner may be evidence tending to show a design on his part, presently or at a future time, to dedicate the streets to public use, but they are not in themselves a conclusive surrender of the land so set apart for use as public highways.

But if the plat referred to contains a statement reserving all rights and privileges not expressly granted, and providing that nothing should be taken by implication to be granted, there can be no implication of a dedication of streets or land reserved for parks to the use of the public. Even if the grantor, before making the deed, has represented that land marked upon the plat for use as streets or parks would be dedicated to the public, the purchaser by taking such deed waives the benefit of such representation.<sup>3</sup>

452. A deed of land by a plat showing a street or alley as a boundary conveys the title to the centre of the street or alley, provided the grantor's title extends to the centre.<sup>4</sup> Even if the grantor retains the fee of the streets, the grantee acquires a right of way over them as an easement appurtenant to the land conveyed.<sup>5</sup>

Flannigan, 1 Md. 525; *Transue v. Sell*, 105 Pa. St. 604; *Trutt v. Spotts*, 87 Pa. St. 339; *McKee v. Perchment*, 69 Pa. St. 342; *McCall v. Davis*, 56 Pa. St. 431; *Birmingham v. Anderson*, 48 Pa. St. 253; *Ferguson's App.* 117 Pa. St. 426, 11 Ad. Rep. 885.

<sup>1</sup> *Merrill v. Newton*, 99 Mich. 226, 58 N. W. Rep. 70; *Williams v. St. Louis*, 120 Mo. 403, 25 S. W. Rep. 561. And see *Boland v. St. John's Schools (Mass.)*, 39 N. E. Rep. 1035.

<sup>2</sup> *People v. Kellogg*, 67 Hun, 546, 22 N. Y. Supp. 490; *Niagara Falls Bridge*

*Co. v. Bachman*, 66 N. Y. 261; *Baker v. Mott*, 78 Hun, 141, 28 N. Y. Supp. 968; *Holdane v. Cold Spring*, 21 N. Y. 474.

<sup>3</sup> *Kelly v. West Seattle Land Co.* 4 Wash. St. 194, 29 Pac. Rep. 1054.

<sup>4</sup> *Alameda Macadamizing Co. v. Williams*, 70 Cal. 534, 12 Pac. Rep. 530; *Jacob v. Woolfolk*, 90 Ky. 426, 14 S. W. Rep. 415; *Schneider v. Jacob*, 86 Ky. 101; *Gould v. Howe*, 131 Ill. 490, 23 N. E. Rep. 602.

<sup>5</sup> *Smyles v. Hastings*, 22 N. Y. 217; *Baker v. Mott*, 78 Hun, 141, 28 N. Y. Supp. 968.

In two or three States this rule does not apply, where the plat is made out and recorded in conformity with the statutes of such States upon that subject; but this is because the courts of those States hold that the statutes vest the entire title, beneficial and otherwise, in the city, town, or county, so that the dedicator has no interest left in him which is the subject of grant.<sup>1</sup> Under such a statute the fee in the streets is held in trust for street purposes, and for no other use or purpose. Every other beneficial use is in the lot-owners, and this interest of the lot-owners will pass by a conveyance of the lot.<sup>2</sup> The conveyance of a lot facing on a street set apart in the plat for the use of the owner of the lots abutting thereon conveys only an easement in the street.<sup>3</sup>

453. When a grant is made bounded upon a way or lane, with the privilege of using it, the grant of the easement may, in the light of surrounding circumstances, tend to show that there was no grant of the fee of any part of the lane.<sup>4</sup> In a grant of land upon a highway, the grantor does not convey to his grantee a right of way, for this already exists, and is to be kept in repair at the public expense. The grantor, not being burdened with any covenant, express or implied, that the grantee shall have a right of way, has no occasion to retain the fee of the highway for that purpose; but when the way is one that the grantor has expressly or impliedly assured to the grantee, it is said that there is occasion for the grantor to retain the fee to make his assurance good.<sup>5</sup>

But the better view is that the grant in such a deed of a privilege to use a passageway in common with the grantor and others does not exclude the inference of a grant of one half thereof, because the grant of such a privilege is designed to show that the

<sup>1</sup> *Canal Trustees v. Havens*, 11 Ill. 554; *Snoddy v. Bolen*, 122 Mo. 479, 25 S. W. Rep. 932.

<sup>2</sup> *Bridge Co. v. Schaubacher*, 57 Mo. 582; *Price v. Thompson*, 48 Mo. 361; *Ferrenbach v. Turner*, 86 Mo. 416.

<sup>3</sup> *Tatum v. St. Louis (Mo.)*, 28 S. W. Rep. 1002.

<sup>4</sup> *Hobson v. Philadelphia*, 150 Pa. St. 595, 24 Atl. Rep. 1048, 31 W. N. C. 9; *Mott v. Mott*, 68 N. Y. 246.

<sup>5</sup> *Bangor House v. Brown*, 33 Me. 309; *Ames v. Hilton*, 70 Me. 36; *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636.

grantee shall have a right to use the whole width of such passageway.<sup>1</sup>

A deed describing the land as extending "to a driveway, thence easterly on said driveway" a certain distance, and reserving all existing rights of way over the driveway, and declaring that said driveway shall remain open and common to all parties having a right therein, conveys title in fee to its centre, subject to such easements, and with a corresponding easement over the other half.<sup>2</sup>

454. The intention as regards conveying to the middle of the street is to be found not only in the terms used in the deed, but in the circumstances attending the transaction. Each case is to be decided in large part according to its own circumstances.<sup>3</sup> But in some way the intent to exclude the entire street must appear, else the general presumption will prevail. Such intent is not presumed, but on the contrary the intent to include the street to the middle line is presumed.<sup>4</sup> A manifest intention not to grant the fee to the centre of the street was shown in a case where a town granted to the owner of land bordering on a highway, the fee of which was in the town, a strip of land from the highway, and discontinued such strip as a part of the highway.<sup>5</sup> The mere fact that the land is not described as abutting or bounding on a highway, and that the highway is not mentioned, does not prevent the application of the rule if in fact the land borders on it.<sup>6</sup> Thus, where the property conveyed was de-

<sup>1</sup> Gould v. Eastern R. R. Co. 142 Mass. 85, 7 N. E. Rep. 543; Motley v. Sargent, 119 Mass. 231; Peck v. Denniston, 121 Mass. 17; Stark v. Coffin, 105 Mass. 328; Lewis v. Beattie, 105 Mass. 410; Winslow v. King, 14 Gray, 321; Boston v. Richardson, 13 Allen, 146; White v. Godfrey, 97 Mass. 472; Boland v. St. John's Schools (Mass.), 39 N. E. Rep. 1035.

<sup>2</sup> Boland v. St. John's Schools (Mass.), 39 N. E. Rep. 1035. And see Fisher v. Smith, 9 Gray, 441; Boston v. Richardson, 13 Allen, 146, 153, 154; White v. Godfrey, 97 Mass. 472, 474; Stark v. Coffin, 105 Mass. 328, 330.

<sup>3</sup> Salisbury v. Great Northern Ry. Co. 5 C. B. N. S. 174; Hamlin v. Pairpoint Manuf. Co. 141 Mass. 51, 6 N. E. Rep. 531; Gaylord v. King, 142 Mass. 495, 8 N. E. Rep. 596; Motley v. Sargent, 119

Mass. 231; Phelps v. Webster, 134 Mass. 17; Webber v. Eastern R. R. Co. 2 Met. 147; Codman v. Evans, 1 Allen, 443; White's Bank v. Nichols, 64 N. Y. 65; Mott v. Mott, 68 N. Y. 246; *In re Ladue*, 118 N. Y. 213; Jackson v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Augustine v. Britt, 15 Hun, 395, affirmed 80 N. Y. 647; King's County Fire Insurance Co. v. Stevens, 87 N. Y. 287; Dexter v. Riverside Mills, 15 N. Y. Supp. 374; Hughes v. Prov. & W. R. Co. 2 R. I. 508.

<sup>4</sup> Pollock v. Morris, 19 J. & S. 112; Mott v. Mott, 68 N. Y. 246; Marsh v. Burt, 34 Vt. 289; Henderson v. Hatterman, 146 Ill. 555, 34 N. E. Rep. 1041.

<sup>5</sup> Gaylord v. King, 142 Mass. 495, 8 N. E. Rep. 596.

<sup>6</sup> Bissell v. New York Cent. R. Co. 23 N. Y. 61; Gear v. Barnum, 37 Conn.

scribed as a store building, and the land on which it stood in fact bounded upon the highway, the mere fact that the highway is not mentioned does not vary the general rule that a conveyance by a highway carries the fee to the centre of it.<sup>1</sup>

455. The fact that the measurements of the side lines reach only to the outer line of a highway is not sufficient to control the presumption of an intention to convey the fee to the centre of the highway.<sup>2</sup> Where the description carried the parcel so many feet to a street named, "thence along the northerly side of said street," it was held that the fee of the street to the centre passed by the deed.<sup>3</sup> The presumption of a conveyance to the centre of the street is not rebutted in case of a boundary by a road "to a stone wall," and thence by the wall, by the fact that the wall terminated at the side of the street. In such case the boundary is by the centre of the road to the line of the wall extended.<sup>4</sup> A boundary by "other land of the grantor on a passageway," when in fact there is no passageway and the only reference to it is in this description, includes no part of any passageway. The boundary is controlled by the measurements.<sup>5</sup>

456. The fact that the measurements and the coloring of a plan referred to exclude the streets is not sufficient to control the presumption that the deed passes the fee to the centre of the streets.<sup>6</sup> "But although in such cases the literal description in the conveyance does not in terms include the grantor's interest in

229; *Champlin v. Pendleton*, 13 Conn. 23.

<sup>1</sup> *Gear v. Barnum*, 37 Conn. 229; *Henderson v. Hatterman*, 146 Ill. 555, 34 N. E. Rep. 1041.

<sup>2</sup> *Oxton v. Groves*, 68 Me. 371, 28 Am. Rep. 75; *Hunt v. Rich*, 38 Me. 195; *Johnson v. Anderson*, 18 Me. 76; *Cottle v. Young*, 59 Me. 105; *Woodman v. Spencer*, 54 N. H. 507; *Moody v. Palmer*, 50 Cal. 31; *Clark v. Parker*, 106 Mass. 554; *Stark v. Coffin*, 105 Mass. 328; *Motley v. Sargent*, 119 Mass. 231; *Codman v. Evans*, 1 Allen, 443; *Dean v. Lowell*, 135 Mass. 55; *Gould v. Eastern R. R. Co.* 142 Mass. 85, 7 N. E. Rep. 543; *Walker v. Boynton*, 120 Mass. 349; *Phillips v. Bowers*, 7 Gray, 21; *Newhall v. Ireson*, 8 Cush. 595, 55 Am. Dec. 790; *Gear v. Barnum*,

37 Conn. 229; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Cox v. Freedley*, 33 Pa. St. 124, 75 Am. Dec. 584; *Paul v. Carver*, 26 Pa. St. 223; *Henderson v. Hatterman*, 146 Ill. 555, 34 N. E. Rep. 1041.

<sup>3</sup> *Paul v. Carver*, 26 Pa. St. 223, 67 Am. Dec. 413; *Cox v. Freedley*, 33 Pa. St. 124, 75 Am. Dec. 584; *Pollock v. Morris*, 19 J. & S. 112; *Foreman v. Presbyterian Asso. (Md.)* 30 Atl. Rep. 1114.

<sup>4</sup> *Dean v. Lowell*, 135 Mass. 55.

<sup>5</sup> *Treat v. Joselyn*, 139 Mass. 94, 29 N. E. Rep. 653.

<sup>6</sup> *Berridge v. Ward*, 10 C. B. N. S. 400; *Gould v. Eastern R. R. Co.* 142 Mass. 85, 89, 7 N. E. Rep. 543; *White's Bank v. Nichols*, 64 N. Y. 65, 71; *Pollock v. Morris*, 19 J. & S. 112.

the adjacent streets or passageways, yet the presumption is so strong that a grantor under such circumstances does not intend to retain the fee therein, subject to the right of way, after disposing of all his interest in the land which is subject to exclusive occupancy, that it has come to be established as a rule of law that the conveyance will by implication be held to include one half of such adjacent streets and passageways, if the grantor owns the same, unless there is something further to show a contrary intention."<sup>1</sup> When by statute the fee of streets shown upon recorded plats is vested in the city, town, or county, land conveyed by reference to such plats necessarily excludes the streets.<sup>2</sup>

**457.** In accordance with the general rule, an exception of a highway is not an exception of the fee, unless such clearly appears to have been the intention, but only of the easement of the public to the use of such highway.<sup>3</sup> In like manner the grant of a way or of the privilege of a highway carries an easement only.<sup>4</sup> A reservation by the grantor of a road through the land conveyed, in order to enable him to reach a highway from other land owned by him, will be presumed, in the absence of a clear indication in the deed to the contrary, to be a reservation merely of the use of the road, and not the fee therein.<sup>5</sup>

**458.** The general rule does not apply when the grantor does not own the fee of the street. The law will not presume that he intended to convey land which he did not own.<sup>6</sup>

If land taken for a canal has been acquired in fee from the adjoining owners, a conveyance by such owners of land bounded by the canal is a conveyance only to the exterior line of the canal.<sup>7</sup>

**459.** Where the grantor owns the fee of the entire street, a

<sup>1</sup> *Gould v. Eastern R. R.* 142 Mass. 85, 89, 7 N. E. Rep. 543, per C. Allen, J.

<sup>2</sup> *Burbach v. Schweinler*, 56 Wis. 386, 14 N. W. Rep. 449.

<sup>3</sup> *Richardson v. Palmer*, 38 N. H. 212; *Kuhn v. Farnsworth*, 69 Me. 404; *Moulton v. Trafion*, 64 Me. 218; *Elliot v. Small*, 35 Minn. 396, 29 N. W. Rep. 158, 59 Am. Rep. 329; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216.

<sup>4</sup> *Jamaica Pond Aq. Co. v. Chandler*, 9 Allen, 159.

<sup>5</sup> *Redemptorist v. Wenig* (Md.), 29 Atl. Rep. 667.

<sup>6</sup> *Church v. Stiles*, 59 Vt. 642, 10 Atl. Rep. 674; *Dunham v. Williams*, 37 N. Y. 251; *In re Robbins*, 34 Minn. 99, 24 N. W. Rep. 356, 57 Am. Rep. 40; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. Rep. 279; *Watrous v. Southworth*, 5 Conn. 305; *Burbach v. Schweinler*, 56 Wis. 386, 14 N. W. Rep. 449. *Contra*, *Ayres v. Penn. R. R. Co.* 48 N. J. L. 44, 3 Atl. Rep. 885, 57 Am. Rep. 538.

<sup>7</sup> *Hunt v. Raplee*, 44 Hun, 149.

presumption arises that, upon a sale of land bounded upon the street, he intended to convey the fee in the street to the opposite boundary, if he owns no land on the opposite side of the street, and did not intend to retain an interest in any portion of the street fronting the land so conveyed.<sup>1</sup> Of course, if there is any reason for supposing the grantor did not intend to convey the fee of the entire width of the street, as in case he has interests in the land the other side of the street, such as riparian rights, then the ordinary presumption will apply, and the grantee will take the fee only to the middle of the street.<sup>2</sup>

**460.** The rule does not apply when the grantor, after making a conveyance, lays out a street adjoining the land conveyed, without having referred in such conveyance to any street or way.<sup>3</sup>

**461.** The rule of construction is not uniform, for in some States strong language indicative of the intention to exclude a grant of the fee of the street is required to rebut the presumption of intent to grant the way. Thus in several States the rule seems to be that nothing short of direct expression of intention to exclude the soil of the highway will have the effect of excluding it.<sup>4</sup> In these States the mere mention of the side of the road,

<sup>1</sup> *Healey v. Babbitt*, 14 R. I. 533; *Gray*, 21; *Smith v. Slocomb*, 9 Gray, 36, 69; *Thompson v. Major*, 58 N. H. 242; *In re Robbins*, 34 Minn. 99, 24 N. W. Rep. 356, 57 Am. Rep. 40; *Taylor v. Armstrong*, 24 Ark. 102; *Snoddy v. Bolen*, 122 Mo. 479, 25 S. W. Rep. 932, per Black, J.; *Wait v. May*, 48 Minn. 453, 51 N. W. Rep. 471; *Haberman v. Baker*, 128 N. Y. 253, 28 N. E. Rep. 370.

<sup>2</sup> *Crisbine v. St. Paul & S. C. R. Co.* 23 Minn. 114.

<sup>3</sup> *Knott v. Jefferson St. Ferry Co.* 9 Oreg. 530; *Valley Pulp & Paper Co. v. West*, 58 Wis. 599, 17 N. W. Rep. 554.

<sup>4</sup> *Connecticut*: *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Gear v. Barnum*, 37 Conn. 229. *Maryland*: *Laws* 1892, ch. 684; *Baltimore & O. R. R. Co. v. Gould*, 67 Md. 60, 8 Atl. Rep. 754; *Peabody Heights Co. v. Sadtler*, 63 Md. 533, 52 Am. Rep. 519; *Foreman v. Presbyterian Asso. (Md.)* 30 Atl. Rep. 1114. *Massachusetts*: *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Phillips v. Bowers*, 7

*Gray*, 21; *Smith v. Slocomb*, 9 Gray, 36, 69 Am. Dec. 274; *Sibley v. Holden*, 10 Pick. 249, 20 Am. Dec. 521. *Missouri*: *Grant v. Moon (Mo.)*, 30 S. W. Rep. 328; *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. Rep. 142, 25 S. W. Rep. 932. *Rhode Island*: *Anthony v. Providence (R. I.)*, 28 Atl. Rep. 766. Mr. Justice Stiness said: "The law should be uniform, and that which is established in case of a boundary 'upon' or 'by' should apply to all cases, except where there is a clear and express reservation. Such a rule is useful, reasonable, and just. It rests upon no new doctrine, but it is the unavoidable logic of the promise which in any case extends a boundary into the highway. Its utility is evidenced by statutory enactment in several States, and its authority is abundantly sustained by the better reason and greater weight of decision." *Pennsylvania*: *Cox v. Freedley*, 33 Pa. St. 124; *Paul v. Carver*, 26 Pa. St. 223; *Trutt v. Spotts*, 87 Pa. St. 339; *Transue v. Sell*, 105 Pa. St. 604.

or of a monument on the side of a road, as the place of beginning or end of a line, is not sufficient to exclude the road from the grant.<sup>1</sup> Even a boundary by the south line of a street has been held to pass the title to the centre line of it.<sup>2</sup> If, however, in addition to such words, there are other words or metes and bounds showing an intention to exclude the highway, such intention must prevail.<sup>3</sup>

462. The presumption is more readily met, however, in other States, and the intention that the highway shall be wholly excluded from the grant may be gathered from indirect words interpreted with reference to attending circumstances. In these States, if a boundary commences at a point or monument on the side of a road and thence runs along the road, the boundary is by the margin of the road and not by its centre line.<sup>4</sup> The rule is the same although the deed states that the road was laid out for the accommodation of purchasers of lots bounding upon the road, and the location of the lots and of the road is shown on a plat.

In a recent case in New York the Court of Appeals said: "There is great difficulty in reconciling the decisions in this State upon the question of when a description in a deed which bounds the premises upon a highway or street shall be deemed to take in the fee to the centre line of the roadbed in front of the premises. There is no doubt about the rule being settled that there is a legal presumption against the grantor's intending to reserve to himself the title to the soil of the highway, and that such presumption is only overcome by language in the conveyance clearly indicating such an intention on his part; but the application of

<sup>1</sup> *Low v. Tibbetts*, 72 Me. 92, 39 Am. Rep. 303; *Cottle v. Young*, 59 Me. 105, 109; *Johnson v. Anderson*, 18 Me. 76; *Champlin v. Penileton*, 13 Conn. 23; *Borough of Easton's App.* 81 Pa. St. 85; *Cox v. Freedley*, 33 Pa. St. 124, 70 Am. Dec. 584; *Paul v. Carver*, 26 Pa. St. 223, 67 Am. Dec. 413.

<sup>2</sup> *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 32 Am. Rep. 719. See, however, § 463.

<sup>3</sup> *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 13. See § 465.

<sup>4</sup> *Blackman v. Riley*, 138 N. Y. 318, 34 N. E. Rep. 214; *King's Co. Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep.

361; *English v. Brennan*, 60 N. Y. 609; *White's Bank v. Nichols*, 64 N. Y. 65; *Mead v. Riley*, 18 J. & S. 20; *Tag v. Keteltas*, 16 J. & S. 241; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Lee v. Lee*, 27 Hun, 1; *Dexter v. Riverside Mills Co.* 15 N. Y. Supp. 374; *Greer v. N. Y. Cent. & H. R. R. Co.* 37 Hun, 346; *De Peyster v. Mali*, 27 Hun, 436; *Augustine v. Britt*, 15 Hun, 395, affirmed 80 N. Y. 647; *Morison v. New York Elevated R. Co.* 74 Hun, 398, 26 N. Y. Supp. 641; *Holloway v. Southmayd*, 139 N. Y. 390, 64 Hun, 27, 18 N. Y. Supp. 707, 28 Abb. N. C. 183, 190.



the rule is made uncertain, through the varying opinions of courts as to the inferences which we shall draw as to the intention from the words in which the grant is couched."<sup>1</sup>

463. It is quite generally held that when the descriptive words are, "by the side of," "by the margin of," or "by the line of," or equivalent terms, the fee of the highway is excluded.<sup>2</sup> A boundary line which runs across a road, and thence by the side of the road, is by the margin of the road and not by its centre. In such case the language is express that the boundary is not on the road, but by the side of it.<sup>3</sup>

A boundary described as running between fixed monuments on the side of a street does not include the fee of the street to the centre.<sup>4</sup> So, also, where one end of a line is fixed on the side

<sup>1</sup> *Holloway v. Southmayd*, 139 N. Y. 390, 400, per Gray, J. "Sufficient evidence of that uncertainty of application will be found from reading the opinions since the early case of *Jackson v. Hathaway*, 15 Johns. 447, down to a very recent date."

<sup>2</sup> Angell on Highways, § 314. California: *Moody v. Palmer*, 50 Cal. 31; *Severy v. Central Pac. R. Co.* 51 Cal. 194; *Alameda Macadamizing Co. v. Williams*, 70 Cal. 534. Illinois: *Chicago v. Rumsey*, 87 Ill. 348; *Helm v. Webster*, 85 Ill. 116. Maine: *Cottle v. Young*, 59 Me. 105; *Oxton v. Groves*, 68 Me. 371, 28 Am. Rep. 75. Maryland: *Baltimore & O. R. R. Co. v. Gould*, 67 Md. 60, 8 Atl. Rep. 754; *Peabody Heights Co. v. Sadtler*, 63 Md. 533, 52 Am. Rep. 519. Massachusetts: *Hamlin v. Pairpoint Manuf. Co.* 141 Mass. 51, 6 N. E. Rep. 531; *Phelps v. Webster*, 134 Mass. 17; *Holmes v. Turner's Falls Co.* 142 Mass. 590, 8 N. E. Rep. 646; *Smith v. Slocomb*, 9 Gray, 36, 69 Am. Dec. 274; *Phillips v. Bowers*, 7 Gray, 21; *Sibley v. Holden*, 10 Pick. 249, 20 Am. Dec. 521; *Brainard v. Boston & N. Y. Cent. R. R. Co.* 12 Gray, 407. Michigan: *Grand Rapids & Ind. R. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306. New York: *Greer v. New York Cent. & H. R. R. Co.* 37 Hun, 346; *Clark v. Rochester City R. Co.* 2 N. Y. Supp. 563; *Mead v. Riley*, 18 J. & S. 20;

*Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *King's Co. Ins. Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 361; *Starr v. Child*, 5 Den. 599; *Halsey v. McCormick*, 13 N. Y. 296; *Fearing v. Irwin*, 4 Daly, 385; *De Peyster v. Mall*, 27 Hun, 439; *Dexter v. Riverside Mills*, 15 N. Y. Supp. 374; *Holloway v. Delano*, 139 N. Y. 390, 34 N. E. Rep. 1052, affirming 18 N. Y. Supp. 704; *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. Rep. 1047. New Jersey: *Salter v. Jonas*, 39 N. J. L. 469, 23 Am. Rep. 229; *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 13. Ohio: *Lough v. Machlin*, 40 Ohio St. 332. Rhode Island: *Hughes v. Providence R. R. Co.* 2 R. I. 508; *Anthony v. Providence (R. I.)*, 28 Atl. Rep. 766. Vermont: *Morrow v. Willard*, 30 Vt. 118. Wisconsin: *Kneeland v. Van Valkenburg*, 46 Wis. 434, 32 Am. Rep. 719.

<sup>3</sup> *Holmes v. Turner's Falls Co.* 142 Mass. 590, 8 N. E. Rep. 646.

<sup>4</sup> *Peabody Heights Co. v. Sadtler*, 63 Md. 533; *Hunt v. Brown*, 75 Md. 481, 23 Atl. Rep. 1029, per Robinson, J. "At the same time we cannot shut our eyes to the fact that in nine cases out of ten there is no intention either way on the part of the grantor or the grantees. . . . And to avoid litigation of this kind, involving the construction as to the intention of the parties, at the best sometimes doubtful, it would be better, it seems to us, to declare

of a highway, no rule of construction will justify the location of the other end of that line in the centre of it. Such a location should be made only when required by express words to that effect.<sup>1</sup>

464. A deed merely describing land as situate on the side of a street passes the title to the centre of the street.<sup>2</sup> And so a deed describing land as "beginning on the southerly side" of a road, at the corner of land belonging to a third person named, and thence running on said road, conveys the title to the middle of the road.<sup>3</sup> In these cases no fixed monument, such as a stake and stones at the edge of the road, is referred to, and there is nothing to prevent the application of the general rule. In case a stake and stones referred to are not to be found, it seems the title to the centre line of the road would pass.<sup>4</sup>

On the other hand, some of the cases go even to the extent of holding that the point of intersection of two streets taken as a starting-point may indicate an intention to exclude a grant of the fee of a street. The point thus established is regarded as controlling the other parts of the description, and lines running thence along the streets are confined to the exterior lines of the streets, and the soil of the street is not included.<sup>5</sup>

by legislative enactment that all grants hereafter made of land bordering on a highway shall carry the fee to the middle of the highway, provided the grantor is the owner of the fee, unless the fee is reserved in express terms to the grantor." Such a statute was enacted. Laws 1892, ch. 684.

<sup>1</sup> *Rieman v. Baltimore Belt R. Co.* (Md.) 31 Atl. Rep. 444. In *Sibley v. Holden*, 10 Pick. 249, the Supreme Court of Massachusetts uses this language: "As one point in this line is fixed by the description to the side of the road, we are satisfied that, by a just and necessary construction, the other point must be taken to be at the same side of the road, and therefore the soil of the road is not included."

<sup>2</sup> *White v. Godfrey*, 97 Mass. 472.

<sup>3</sup> *Chadwick v. Davis*, 143 Mass. 7, 8 N. E. Rep. 601; *O'Connell v. Bryant*, 121 Mass. 557; *Peck v. Denniston*, 121 Mass. 17; *Phillips v. Bowers*, 7 Gray, 21.

<sup>4</sup> *Chadwick v. Davis*, 143 Mass. 7, 8 N. E. Rep. 601.

<sup>5</sup> *Rieman v. Baltimore Belt R. Co.* (Md.) 31 Atl. Rep. 444. The description in a deed was as follows: "Beginning . . . at the southeast corner or intersection of H and G streets, and running thence easterly, bounding on G Street, 25 feet; then southerly, parallel with H Street, 80 feet, to an alley; then westerly, bounding on said alley, to H Street, 25 feet; and thence northerly, bounding on H Street, to the place of beginning." It was held that "the southeast corner" of H and G streets was the point of intersection of the east side of H Street and the south side of G Street, and no part of the roadbed of H Street passed by the deed. *White's Bank v. Nichols*, 64 N. Y. 65; *English v. Brennan*, 60 N. Y. 609; *Augustine v. Britt*, 15 Hun, 395, affirmed 80 N. Y. 647. See, however, *Mott v. Mott*, 68 N. Y. 246; *Cochran v. Smith*, 73 Hun, 597, 26 N. Y.

465. When a road is a terminus a quo, there is more uncertainty whether the boundary is the centre of the road than there is when the road is made the *terminus ad quem*; for it seems that in some places it is a common method of measurement, in measuring from a road, to measure from the side of the road instead of the centre; and there might be a reasonable presumption that the measurement was in fact made in this way, unless something appears affirmatively to show that the measurement began at the centre of the road. Such a presumption would be controlled by evidence that the parties at the time of the conveyance established monuments at the distance called for from the centre line of the road, and that the land was afterwards fenced and occupied in accordance with such monuments.<sup>1</sup>

For the purposes of measurement and quantity, a deed of a platted lot giving the measurement from a corner of the lot at the street may convey the land according to the measurement from the border of the street, and not from its centre, although the plat, in giving the size of the lot, measures to the centre of the street.<sup>2</sup>

466. A grant of land bounded upon a public street will be referred to the street as actually built and used, rather than to the street as shown upon a recorded plat or map, or by a survey, especially when these lines nearly coincide.<sup>3</sup> The street is a monument, and, like any other object mentioned as a monument, it is something visible and existing in fact. A road or highway mentioned as a boundary means the apparent and existing road or high-

Supp. 103; *Holloway v. Delano*, 18 N. Y. Supp. 704.

<sup>1</sup> *Dodd v. Witt*, 139 Mass. 63, 29 N. E. Rep. 475, 52 Am. Rep. 700.

<sup>2</sup> *Montgomery v. Hines*, 134 Ind. 221, 33 N. E. Rep. 1100.

<sup>3</sup> *Foley v. McCarthy*, 157 Mass. 474, 32 N. E. Rep. 669; *O'Brien v. King*, 49 N. J. L. 79, 7 Atl. Rep. 34; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Haring v. Van Houten*, 22 N. J. L. 61; *Jackson v. Perrine*, 35 N. J. L. 137; *Smith v. State*, 23 N. J. L. 130; *Aldrich v. Billings*, 14 R. I. 233; *Draper v. Monroe* (R. I.), 28 Atl. Rep. 340; *Hoffman v. Port Huron* (Mich.), 60 N. W. Rep. 831; *Twogood v. Hoyt*, 42 Mich. 609, 4 N. W. Rep. 445; *Van*

*Den Brooks v. Correon*, 48 Mich. 283, 12 N. W. Rep. 206; *Atwood v. Canrike*, 86 Mich. 99, 103, 48 N. W. Rep. 950; *Orena v. Santa Barbara*, 91 Cal. 621, 28 Pac. Rep. 268; *Brown v. Heard*, 85 Me. 294, 27 Atl. Rep. 182; *Tebbetts v. Estes*, 52 Me. 566; *Blackman v. Riley*, 138 N. Y. 318, 34 N. E. Rep. 214; *Falls Village W. Power Co. v. Tibbetts*, 31 Conn. 165; *Bristol Manuf. Co. v. Barnes*, 54 Conn. 53, 5 Atl. Rep. 593; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. Rep. 150; *Cleveland v. Obenchain*, 107 Ind. 591, 8 S. E. Rep. 624; *Bradstreet v. Dunham*, 65 Iowa, 248, 21 N. W. Rep. 592; *Winter v. Payne*, 33 Fla. 470, 15 So. Rep. 211.

way, and not that which may exist of record, or that may be determined by a survey. It is like any other monument described as a boundary, a monument existing in fact.<sup>1</sup> But where land is conveyed bounded by the line of a highway, parol evidence is admissible to show whether, by such description, the parties meant the surveyed line of the highway or the line as actually used and occupied.<sup>2</sup> If the road had not been actually opened at the date of the conveyance, but there was then a recorded plat of it, the location of it must be determined by the plat, as the description in the deed must necessarily refer to that.<sup>3</sup>

Where land is bounded on the west by a street, according to a map referred to, the meaning of the deed is that, wherever the eastern line of the street, as it was laid out or actually surveyed, is, there also is the western boundary of the land conveyed.<sup>4</sup>

A deed describing land as beginning at a point "ranging" with the south line of a street refers to the street as extended to the property on a recorded plat, and not as it actually exists some distance away.<sup>5</sup>

Where the question was whether a lot was conveyed with reference to the street which formed its eastern boundary, as opened and used, or as shown on a certain map which represented a wider street, the circumstances were considered material and conclusive. There was no reference to the map in the deed, and nothing was said as to the eastern boundary. The purchaser was familiar with the actual location of the street when he made the purchase. The street existed before the map was made, but had never been open or used to the width shown by the map; and the trees, sidewalk, and fences indicated the width to be different from that shown by the map. It was held that a finding, that the parties intended to make the boundary by the street as it appeared and was actually used when the deed was executed, was proper.<sup>6</sup>

**467. A proposed street, or one which does not exist in**

<sup>1</sup> *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 167; *Bristol Manuf. Co. v. Barnes*, 54 Conn. 53, 5 Atl. Rep. 593; *Brown v. Heard*, 85 Me. 294, 27 Atl. Rep. 182; *Frost v. Angier*, 127 Mass. 212; *Racine v. Emerson*, 85 Wis. 80, 55 N. W. Rep. 177.

<sup>2</sup> *Wead v. St. Johnsbury & L. C. R. Co.* 64 Vt. 52, 24 Atl. Rep. 361.

<sup>3</sup> *Atwood v. Canrike*, 86 Mich. 99, 48 N. W. Rep. 950.

<sup>4</sup> *Andreu v. Watkins*, 26 Fla. 390, 7 So. Rep. 876.

<sup>5</sup> *Reid v. Klein (Ind.)*, 37 N. E. Rep. 967.

<sup>6</sup> *Barrows v. Webster (N. Y.)*, 39 N. E. Rep. 357. And see *McShane v. Main*, 62 N. H. 4.

fact, may be used as a monument. Thus, where a street extends up to an unplatted and unsurveyed tract of land, but has not yet been extended into such tract, and a lot is sold, and its boundaries fixed by such street, just as if it had been extended into the tract, and there is no doubt as to just where the street when extended would be, the fixing of it as a boundary will control the courses and distances of the conveyance.<sup>1</sup>

Where a boundary is made by a street which is practically located after the execution of the deed, such location may be looked to for the location of the land, and when the street is accepted it is presumably the street referred to in the deed.<sup>2</sup>

If a lot is bounded upon a projected street, and the street is laid out and opened on the grantor's land some distance in front of the lot, according to the measurements and the plat referred to, the land between the lot as described and the street as laid out passes by the deed.<sup>3</sup>

Where land was conveyed to a railroad company for purposes of its business by a deed which described the land by reference to the line of the road of such company as then located, but not built, the boundary lines are not affected by a subsequent change in the location of the road.<sup>4</sup>

The fact that land conveyed is described in the deed as situated on a certain street is not an implied covenant on the part of the grantor that such street exists, where there is no reference to any plan or to the street except in the description of the land.<sup>5</sup>

**468.** When a street or way is discontinued, the owners of land adjacent to it as a rule are entitled to the full possession and use of the land which was already theirs in fee. The easement of the public is at an end, and the adjacent owners take possession under their respective titles.<sup>6</sup> Where by statute the fee of streets and ways vests absolutely in the city, town, or county, it is in several States provided by statute that, when any street or way

<sup>1</sup> *Potts v. Canton Warehouse Co.* 70 Miss. 462, 12 So. Rep. 147; *Stark v. Coffin*, 105 Mass. 328; *Johnson v. Arnold*, 91 Ga. 659, 18 S. E. Rep. 370.

<sup>2</sup> *Payne v. English*, 101 Cal. 10, 35 Pac. Rep. 348. And see *Oreña v. Santa Barbara*, 91 Cal. 621, 28 Pac. Rep. 268.

<sup>3</sup> *Draper v. Monroe (R. I.)*, 28 Atl. Rep. 340.

<sup>4</sup> *King v. Norfolk & W. R. Co. (Va.)* 17 S. E. Rep. 868.

<sup>5</sup> *Cole v. Hadley*, 162 Mass. 579, 39 N. E. Rep. 279.

<sup>6</sup> *Wallace v. Fee*, 50 N. Y. 694; *Moody v. Palmer*, 50 Cal. 31; *Ott v. Kreiter*, 110 Pa. St. 370, 1 Atl. Rep. 724; *Kimball v. Kenosha*, 4 Wis. 321; *Healey v. Babbitt*, 14 R. I. 533.

is vacated, the same shall revert to the owners of the real estate adjacent thereto on each side, subject to the right of the city to reopen the street without expense.<sup>1</sup> Under such a statute in Illinois it was held that the title reverted to the original proprietor, and not to adjacent landowners; but in Iowa and Kansas it is held that it passes to the adjacent landowner.<sup>2</sup>

469. Even if the grantee does not acquire the fee to any part of the street, he may have a perpetual easement of way, to be kept open, though it be discontinued as a public highway. Thus, in case a grantor has bounded land by a street in such a way as to retain title to the soil of the entire street, and the street is afterwards discontinued as a public highway, the grantee still retains an implied grant of a private easement in the street.<sup>3</sup> It is the grantee's right in such case to have the space of ground which was the street left open forever as a way to be used for every purpose that may be usual for the accommodation of the adjoining land of the grantee. This rule is stated by Chief Justice Shaw<sup>4</sup> with the force and perspicuity usual in his opinions: "It seems reasonable, and quite within the principle of equity on which this rule is founded, to apply it to the discontinuance of a highway, so that, if a man should grant land bounding expressly on the side of a highway, if the grantor own the soil under the highway, and the highway, by competent authority, should be discontinued, such grantor could not so use the soil of the highway as to defeat his grantee's right of way, or render it substantially less beneficial. Whether this should be deemed to operate as an implied grant or as an implied warranty covenant and estoppel, binding on the grantor and his heirs, is immaterial. The right itself would be inferred from that great principle of construction that every grant and covenant shall be so construed as to secure to the grantee the benefits intended to be conferred by the grant, and that the grantor shall do nothing to defeat or essentially impair his grant."

In a recent important case in New York the owner of land

<sup>1</sup> Gebhardt v. Reeves, 75 Ill. 301.

<sup>2</sup> Day v. Schroeder, 46 Iowa, 546; Atchison, T. & S. F. R. Co. v. Patch, 28 Kans. 470.

<sup>3</sup> Parker v. Framingham, 8 Met. 260; Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. Rep. 1047; White's Bank v.

Nichols, 64 N. Y. 65; Huttemeier v.

Albro, 18 N. Y. 48; De Peyster v. Mali, 92 N. Y. 262; Holloway v. Delano, 139 N. Y. 390, 34 N. E. Rep. 1052.

<sup>4</sup> Parker v. Framingham, 8 Met. 260. See, however, Baltimore & O. R. Co. v. Gould, 67 Md. 60, 8 Atl. Rep. 754.

conveyed a portion of it, bounding it upon a public highway in such terms that the fee of the road was not transferred by the deed. Subsequently the road was legally closed as a highway, and an heir of the grantor claimed to be entitled in fee to the land lying in front of the parcel conveyed. His claim was based upon the ground that the grantor's conveyance did not pass the fee in the road in front of the parcel, and that therefore, when the road was closed, the land was relieved of the public easement and reverted to the grantor's heirs. The Court of Appeals said: "We hold that, though the fee of the soil of the road may not have been transferred to the grantee by the conveyance and may have remained in the grantors, and those deriving title from them, yet, in bounding the granted premises upon the Bloomingdale Road, and by including the easements and appurtenances thereto belonging, the grantors impliedly warranted to the grantee that so much of the road should perpetually exist as an open way as bordered upon the premises granted, and in legal effect granted such usual and more or less necessary easements as would be comprehended in the free flow of light and air over and in the free use of the open way as such, *pro tanto*, and which survived the extinguishment of the public easement in the highway by act of law. To those easements the fee in the land embraced in the highway remained perpetually subject. That the ownership of the fee may be barren of profit has nothing to do with the question. In the original sale the owner received, presumably, a value proportioned to the fact that the land sold was upon the Bloomingdale Road, which gave to it access and other advantages. To permit the successors in interest of the original grantor, in the face of the grant, to resume dominion over, and to have the beneficial use of, the land in the old highway, would be unjust, as well as without sufficient warrant in the law."<sup>1</sup>

#### VIII. *Boundary by the Sea, Rivers, and Lakes.*

470. Land by the sea, between high and low water mark, and by rivers where the tide ebbs and flows, is vested in the State. The rule of law in regard to public and private ownership of the shore is exhaustively stated in a recent decision of the Supreme Court of the United States rendered by Mr. Justice

<sup>1</sup> *Holloway v. Southmayd*, 139 N. Y. 390, 410, per Gray, J.

Gray:<sup>1</sup> "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the king, as the sovereign, and the dominion thereof, *jus publicum*, is vested in him, as the representative of the nation and for the public benefit. . . . In England, from the time of Lord Hale, it has been treated as settled, that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage,<sup>2</sup> and that this title, *jus privatum*, whether in the king or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing.<sup>3</sup> The same law has been declared by the House of Lords to prevail in Scotland.<sup>4</sup> . . .

"The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and States, or by the Constitution and laws of the United States. The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the king of England, and taken possession of in his name, by his authority or with his

<sup>1</sup> *Shively v. Bowlby*, 152 U. S. 1. 14 Sup. Ct. Rep. 548. Mr. Justice Gray's opinion is so important that much use of it and of his citations is made in the following pages on the subject of private ownership of the shore.

<sup>2</sup> *Fitzwalter's Case*, 3 Keb. 242, 1 Mod. 105, 3 Shep. Abr. 97; Com. Dig. "Navigation," A, B; Bac. Abr. "Prerogative," B; *King v. Smith*, 2 Doug. 441; *Attorney-General v. Parmeter*, 10 Price, 378; *Attorney-General v. Chambers*, 4 De Gex,

M. & G. 206, 4 De Gex & J. 55; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Attorney-General v. Emerson*, [1891] App. Cas. 649.

<sup>3</sup> *Attorney-General v. Parmeter*, above cited; *Attorney-General v. Johnson*, 2 Wils. Ch. 87; *Gann v. Free Fishers*, 11 H. L. Cas. 192.

<sup>4</sup> *Smith v. Stair*, 6 Bell App. Cas. 487; *Lord Advocate v. Hamilton*, 1 Macq. 46. 49.



assent, they were held by the king as the representative of, and in trust for, the nation, and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide-waters; and upon the American Revolution all the rights of the crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States."<sup>1</sup>

471. The law of the several States bordering on the sea, in regard to the private ownership of the shore, is stated in detail by Mr. Justice Gray in the case already cited.<sup>2</sup> Passing by the New England States for the present, because an exceptional rule prevails there, the following is a summary of the law of the other original States: In New York it was long considered as settled law that the State succeeded to all the rights of the crown and Parliament of England in lands under tide-waters, and that the owner of land bounded by a navigable river within the ebb and flow of the tide had no private title or right in the shore below high-water mark, and was entitled to no compensation for the construction, under a grant from the legislature of the State, of a railroad along the shore between high and low water mark, cutting off all access from his land to the river, except across the railroad.<sup>3</sup> The owner of the upland has no right to wharf out without legislative authority; and titles granted in lands under tide-water are subject to the right of the State to establish harbor lines.<sup>4</sup> The law of that State, as formerly understood, has been recently so far modified as to hold<sup>5</sup> that the owner of land bounded by tide-

<sup>1</sup> *Shively v. Bowlby*, *supra*, citing *Johnson v. McIntosh*, 8 Wheat. 543, 595; *Martin v. Waddell*, 16 Pet. 367; *Commonwealth v. Roxbury*, 9 Gray, 451; *Stevens v. Railroad Co.* 34 N. J. L. 532; *People v. New York & S. I. Ferry Co.* 68 N. Y. 71.

<sup>2</sup> *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548.

<sup>3</sup> *Lansing v. Smith*, 4 Wend. 9, 21; *Gould v. Railroad Co.* 6 N. Y. 522; *People v. Tibbetts*, 19 N. Y. 523, 528; *People v. Canal Appraisers*, 33 N. Y. 461, 467;

*Langdon v. Mayor*, 93 N. Y. 129; *New York v. Hart*, 95 N. Y. 443; *In re Staten Island Rapid Transit Co.* 103 N. Y. 251, 260, 8 N. E. Rep. 548.

<sup>4</sup> *People v. Vanderbilt*, 26 N. Y. 287, 28 N. Y. 396; *People v. New York & S. I. Ferry Co.* 68 N. Y. 71.

<sup>5</sup> In accordance with the decision in *Buccleuch v. Board of Works*, L. R. 5 H. L. 418, and contrary to the decisions in *Gould v. Railroad Co.* 6 N. Y. 522, and in *Stevens v. Railroad Co.* 34 N. J. L. 532.

water may maintain an action against a railroad corporation constructing its road, by authority of the legislature, so as to cut off his access to the water.<sup>1</sup>

In New Jersey it is the settled rule that the lands under water, including the shore on the tide-waters of New Jersey, belong absolutely to the State, which has the power to grant them to any one, free from any right of the riparian owner in them.<sup>2</sup>

In Pennsylvania likewise, upon the Revolution, the State succeeded to the rights, both of the crown and of the proprietors, in the navigable waters and the soil under them.<sup>3</sup> But, by the established law of the State, the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation and to the authority of the legislature to make public improvements upon it, and to regulate his use of it.<sup>4</sup>

In Delaware, all navigable rivers within the State belong to the State, not merely in right of eminent domain, but in actual propriety.<sup>5</sup>

In Maryland, the owner of land bounded by tide-water is authorized, according to various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of his land, and to acquire a right in the land so improved.<sup>6</sup>

<sup>1</sup> *Williams v. New York*, 105 N. Y. 419, 436, 11 N. E. Rep. 829; *Kane v. Railroad Co.* 125 N. Y. 164, 184, 26 N. E. Rep. 278; *Rumsey v. Railroad Co.* 133 N. Y. 79, 30 N. E. Rep. 654, 136 N. Y. 543, 32 N. E. Rep. 979.

<sup>2</sup> *Pennsylvania R. Co. v. New York & L. B. R. Co.* 23 N. J. Eq. 157, 159. See, also, *New York, Lake Erie, &c. R. Co. v. Yard*, 43 N. J. L. 632, 636; *American Dock Co. v. Trustees*, 39 N. J. Eq. 409, 445.

<sup>3</sup> *Rundle v. Canal Co.* 14 How. 80, 90; *Gilman v. Philadelphia*, 3 Wall. 713, 726.

<sup>4</sup> *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 30, 31; *Wainwright v. McCullough*, 63 Pa. St. 66, 74; *Zug v. Commonwealth*, 70 Pa. St. 138; *Philadelphia v. Scott*, 81 Pa. St. 80, 86; *Wall v. Harbor Co.* 152 Pa. St. 427, 25 Atl. Rep. 647.

<sup>5</sup> *Bailey v. Railroad Co.* 4 Harr. (Del.)

389, 395. And see *Willson v. Marsh Co.* 2 Pet. 245, 251.

<sup>6</sup> *Casey v. Inloes*, 1 Gill, 430; *Baltimore v. McKim*, 3 Bland, 453; *Goodsell v. Lawson*, 42 Md. 348; *Garitee v. Baltimore*, 53 Md. 422; *Horner v. Pleasants*, 66 Md. 475, 7 Atl. Rep. 691; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.* 109 U. S. 672, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15, in which the question was who was the riparian owner, and as such entitled to wharf out into the Potomac River, in the District of Columbia, under the authority to do so expressly conferred under the laws of Maryland in force in the District. This court, speaking by Mr. Justice Curtis, in affirming the right of the State of Maryland to protect the oyster fishery within its boundaries, said: "Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the State on whose

In Virginia, by virtue of statutes beginning in 1679, the owner of land bounded by tide-waters has the title to ordinary low-water mark, and the right to build wharves, provided they do not obstruct navigation.<sup>1</sup>

In North Carolina, when not otherwise provided by statute, the private ownership of land bounded by navigable waters stops at high-water mark, and the land between high and low water mark belongs to the State, and may be granted by it.<sup>2</sup> The statutes of that State, at different periods, have either limited grants of land bounded on navigable waters to high-water mark, or have permitted owners of the shore to make entries of the land in front, as far as deep water, for the purpose of a wharf; and any owner of the shore appears to have the right to wharf out, subject to such regulations as the legislature may prescribe for the protection of the public rights of navigation and fishery.<sup>3</sup>

In South Carolina the rules of the common law, by which the title in the land under tide-waters is in the State, and a grant of land bounded by such waters passes no title below high-water mark, appear to be still in force.<sup>4</sup>

In Georgia, also, the rules of the common law would seem to be in force as to tide-waters, except as affected by statutes of the State providing that the right of the owner of lands adjacent to navigable streams extends to low-water mark in the bed of the stream.<sup>5</sup>

This summary "shows that there is no universal and uniform law upon the subject, but that each State has dealt with the lands

maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the Declaration of Independence; but this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish." *Smith v. Maryland*, 18 How. 71, 74.

<sup>1</sup> Code 1887, § 1339; 5 Op. Attys. Gen. 412, 435-440; *French v. Bankhead*, 11 Gratt. 136; *Hardy v. McCullough*, 23 Gratt. 251, 262; *Norfolk City v. Cooke*, 27 Gratt. 430, 434, 435; *Garrison v. Hall*,

75 Va. 150; *McDonald v. Whitehurst*, 47 Fed. Rep. 757.

<sup>2</sup> *Hatfield v. Grimstead*, 7 Ired. 139; *Lewis v. Keeling*, 1 Jones, 299, 306.

<sup>3</sup> *Wilson v. Forbes*, 2 Dev. 30; *Collins v. Benbury*, 3 Ired. 277, 5 Ired. 118; *Gregory v. Forbes*, 96 N. C. 77, 1 S. E. Rep. 541; *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. Rep. 411; *Bond v. Wool*, 107 N. C. 139, 12 S. E. Rep. 281.

<sup>4</sup> *State v. Pacific Guano Co.* 22 S. C. 50; *State v. Pinckney*, 22 S. C. 484.

<sup>5</sup> Code Ga. 1882, §§ 962, 2229, 2230; *Howard v. Ingersoll*, 13 How. 381, 411, 421; *Alabama v. Georgia*, 23 How. 505; *Savannah v. Georgia*, 4 Ga. 26, 39; *Young v. Harrison*, 6 Ga. 130, 141.

under the tide-waters within its borders according to its own views of justice and policy. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another."

The new States admitted into the Union have the same rights as the original States in the tide-waters, and in the lands below the high-water mark, within their respective jurisdictions. Thus, upon the admission of the State of Alabama into the Union, the title in the lands below high-water mark of navigable waters passed to the State, and could not afterwards be granted away by the Congress of the United States.<sup>1</sup> The same doctrine is applicable to California, which was acquired from Mexico by the treaty of Guadalupe Hidalgo of 1848.<sup>2</sup>

472. The law is general that private ownership of land bordering upon tide-waters extends only to high-water mark. The space between high and low water mark is variously denominated "the shore," "the beach," "the flats," "the strand," "the sand," and is also designated by several other less familiar terms. The proprietor of land on the shore or bank is presumed to own to high-water mark only. If he claims ownership below this line, it is for him to establish his claim.<sup>3</sup> The general rule is, that a boundary on the sea, a bay, navigable or tide-water river is a boundary at the ordinary high-water mark.<sup>4</sup> This rule is not

<sup>1</sup> Pollard v. Hagan, 3 How. 212, 221, 222; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. Rep. 548, per Gray, J.

<sup>2</sup> United States v. Pacheco, 2 Wall. 587; Mumford v. Wardwell, 6 Wall. 423; Weber v. Commissioners, 18 Wall. 57; Packer v. Bird, 137 U. S. 661, 666, 11 Sup. Ct. Rep. 210; San Francisco v. Le Roy, 138 U. S. 656, 671, 11 Sup. Ct. Rep. 364; Knight v. U. S. Land Assn. 142 U. S. 161, 12 Sup. Ct. Rep. 258. In the latter case Mr. Justice Lamar, in delivering judgment, said: "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide-waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original States possess within their respective borders. Upon the acquisition

of the territory from Mexico, the United States acquired the title to tide-lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory."

<sup>3</sup> Gould on Waters, 2d ed. § 27; Gann v. Free Fishers, 11 H. L. Cas. 192; Barney v. Keokuk, 94 U. S. 324, 336; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. Rep. 548; United States v. Pacheco, 2 Wall. 587; Oblenis v. Creeth, 67 Fed. Rep. 303; Jones v. Martin, 35 Fed. Rep. 348; Gough v. Bell, 21 N. J. L. 156; Gould v. Railroad Co. 6 N. Y. 522; Brookhaven v. Strong, 60 N. Y. 56; De Lancey v. Piepgas, 17 N. Y. Supp. 681; Martin v. O'Brien, 34 Miss. 21; Boulo v. New Orleans M. & T. R. Co. 55 Ala. 480; Middleton v. Pritchard, 4 Ill. 510.

<sup>4</sup> Storer v. Freeman, 6 Mass. 435;

applicable to a case where, by the cutting of a canal between a fresh-water pond and some body of salt water, the water of the former becomes salt, and the tide ebbs and flows therein.<sup>1</sup> It is a general rule that a boundary by the beach, the shore, the strand, or the space between high-water and low-water mark, whatever name may be given to it, excludes such space unless there is something else in the deed to indicate an intention to pass the title to low-water mark.<sup>2</sup> Where, however, there is a tract of land conveyed by metes and bounds, and within the tract thus exactly defined there is a portion of tide-water, then the grant carries the land under the water, subject to the right of navigation over it, and the continuance of the water's conditions there prevailing.<sup>3</sup>

**473.** A grant from the sovereign of land bounded by the sea, or by any navigable tide-water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.<sup>4</sup>

*Mayor v. Hart*, 95 N. Y. 443, 16 Hun, 380; *People v. Tibbetts*, 19 N. Y. 523; *Gould v. Railroad Co.* 6 N. Y. 522; *Wheeler v. Spinola*, 54 N. Y. 377; *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493; *Canal Com'rs v. People*, 5 Wend. 423, 481; *Wi-wall v. Hall*, 3 Paige, 313; *Champlain & St. L. R. R. Co. v. Valentine*, 19 Barb. 484; *Oakes v. De Lancy*, 14 N. Y. Supp. 294, affirmed 133 N. Y. 227; *East Hampton v. Kirk*, 68 N. Y. 459; *Bell v. Gough*, 23 N. J. L. 624; *Gough v. Bell*, 21 N. J. L. 156; *Yard v. Ocean Beach Asso.* 49 N. J. Eq. 306, 24 Atl. Rep. 729; *Martin v. O'Brien*, 34 Miss. 21; *More v. Massini*, 37 Cal. 432; *Long Beach Land Co. v. Richardson*, 70 Cal. 206, 11 Pac. Rep. 695. In *Connecticut* the State is *prima facie* the owner of the shore between high and low water mark, but the proprietor of land on the shore may own and use it for any purpose not injurious to the public, as for a wharf or stores. *Nichols v. Lewis*, 15 Conn. 137; *Ladies' Friend Soc. v. Halstead*, 58 Conn. 144; *East Haven v. Hemingway*, 7 Conn. 186; *Adams v. Pease*, 2 Conn. 481; *Chapman v. Kimball*, 9 Conn. 38, 21 Am. Dec. 707; *Mather v. Chapman*, 40 Conn. 382, 16

Am. Rep. 46; *Lockwood v. New York & N. H. R. R. Co.* 37 Conn. 387; *De Lancey v. Piepgras*, 63 Hun, 169, 17 N. Y. Supp. 681; *Brookhaven v. Strong*, 60 N. Y. 65. Where the words "shore of the bay" were used as a boundary of land in a decree of the circuit court confirming a claim to lands in California under a Mexican grant, the ordinary high-tide line will be the boundary, though "shore," under the Mexican law, extended only to the extraordinary high-tide line, and the Mexican grant described the land as bounded by the shore, as words used in a common-law court decree must be given the common-law interpretation. *Valentine v. Sloss*, 103 Cal. 215, 37 Pac. Rep. 328.

<sup>1</sup> *Wheeler v. Spinola*, 54 N. Y. 377.

<sup>2</sup> *People v. Jones*, 112 N. Y. 597, 20 N. E. Rep. 577; *Mayor v. Hart*, 95 N. Y. 443; *Oblenis v. Creeth*, 67 Fed. Rep. 303.

<sup>3</sup> *Knight v. U. S. Land Asso.* 142 U. S. 161, 12 Sup. Ct. Rep. 258; *Lowndes v. Board*, 153 U. S. 1, 14 Sup. Ct. Rep. 758; *Oblenis v. Creeth*, 67 Fed. Rep. 303.

<sup>4</sup> *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, per Gray, J., citing Lord Hale in Harg. Law Tracts, pp. 17,

Thus it was held that a grant from the Mexican government, confirmed by a decree of a court of the United States under authority of Congress, of land bounded "by the bay" of San Francisco, did not include land below ordinary high-water mark of the bay.<sup>1</sup> It was also held that a person afterwards acquiring the title of the city in a lot and wharf below high-water mark had no right to complain of works constructed by commissioners of the State, under authority of the legislature, for the protection of the harbor and the convenience of shipping, in front of his wharf, and preventing the approach of vessels to it; and Mr. Justice Field, in delivering judgment, said: "Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide-waters within her limits, passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government."<sup>2</sup>

474. The common-law rule that the title to the shore is in the State does not exclude the possibility of private title derived from the sovereign or obtained by prescription. Thus in New York, where the common-law rule generally prevails, there may be private title to land under bays and harbors, as well as to beaches and the shore, to low-water mark, derived from early

18, 27; *Somerset v. Fogwell*, 5 Barn. & C. 875, 885, 8 Dowl. & R. 747, 755; *Smith v. Stair*, 6 Bell App. Cas. 487; *United States v. Pacheco*, 2 Wall. 587.

By the law of England, also, every building or wharf erected without license below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. Lord Hale, in *Harg. Law Tracts*, p. 85; Mitf.

*Eq. Pl.* (4th ed.) 145; *Blundell v. Catterall*, 5 Barn. & Ald. 268, 298, 305; *Attorney-General v. Richards*, 2 Anstr. 603, 616; *Attorney-General v. Parmeter*, 10 Price, 378, 411, 412; *Attorney-General v. Terry*, 9 Ch. App. 423, 429, note; *Weber v. Commissioners*, 18 Wall. 57, 65; *Barney v. Keokuk*, 94 U. S. 324, 337.

<sup>1</sup> *United States v. Pacheco*, 2 Wall. 587.

<sup>2</sup> *Weber v. Commissioners*, 18 Wall. 65. See, also, *Knight v. U. S. Land Asso.* 142 U. S. 161, 12 Sup. Ct. Rep. 258.

colonial grants, or grants from the English sovereign.<sup>1</sup> The shore, says Lord Hale,<sup>2</sup> “doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea. . . . Yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usage.”

475. In the New England States the rule of private ownership of the shore was established by the Massachusetts colonial ordinance of 1641-1647,<sup>3</sup> and by usage founded thereon. This ordinance, which remains in force to this day, relates to land adjoining creeks, coves, and other places about and upon salt water, where the sea ebbs and flows. “It establishes that the proprietor of such land ‘shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further.’ By low-water mark is meant the lowest line made by the receding tide with the land; not the lowest line which a stream of fresh water emptying into the sea, or a cove or a tidal river, makes with the land. It has nothing to do with a fresh-water stream, or with a tidal channel through which only fresh water flows at low tide. Nothing in the ordinance indicates an intention to preserve the fresh-water stream or channel as a boundary below ordinary high-water mark. And the cases cited show it has not been done in applying it. The channel would not be the boundary even above high-water mark. The rules of proprietorship on a fresh-water stream may furnish in a given case the best analogy for the division of interjacent flats on a stream below a point where the tide ebbs and flows, but beyond that they have no force.”<sup>4</sup>

“The rule or principle of the Massachusetts ordinance has been adopted and practiced on in Plymouth, Maine, Nantucket, and Martha’s Vineyard since their union with the Massachusetts colony under the Massachusetts province charter of 1692.”<sup>5</sup>

<sup>1</sup> *Oakes v. De Lancey*, 71 Hun, 49, affirmed 143 N. Y. 673, 14 N. Y. Supp. 294, affirmed 133 N. Y. 227, 30 N. E. Rep. 974.

<sup>2</sup> Harg. Law Tracts, pp. 11, 12.

<sup>3</sup> Mass. Colony Laws (ed. 1660), p. 50; Mass. Colony Laws (ed. 1672), pp. 90, 91.

<sup>4</sup> *Tappan v. Boston Water-Power Co.* 157 Mass. 24, 29, per Morton, J. This case holds that a channel, to be a boundary

to flats, must be one from which the tide does not ebb at low water.

Grants by the colony of Massachusetts, before the ordinance, of lands bounded by tide-water, did not include any land below high-water mark. *Commonwealth v. Alger*, 7 Cush. 53, 66; *Commonwealth v. City of Roxbury*, 9 Gray, 451, 491-493. See, also, *Litchfield v. Scituate*, 136 Mass. 39.

<sup>5</sup> *Shively v. Bowlby*, 152 U. S. 1, 14 Sup.

"In New Hampshire a right in the shore has been recognized to belong to the owner of the adjoining upland, either by reason of its having once been under the jurisdiction of Massachusetts, or by early and continued usage.<sup>1</sup>

"In Rhode Island the owners of land on tide-water have no title below high-water mark, but by long usage, apparently sanctioned by a colonial statute of 1707, they have been accorded the right to build wharves or other structures upon the flats in front of their lands, provided they do not impede navigation, and have not been prohibited by the legislature; and they may recover damages against one who, without authority from the legislature, fills up such flats so as to impair that right.<sup>2</sup>

"In Connecticut, also, the title in the land below high-water mark is in the State. But by ancient usage, without any early legislation, the proprietor of the upland has the sole right, in the nature of a franchise, to wharf out and occupy the flats, even below low-water mark, provided he does not interfere with navigation; and this right may be conveyed separately from the upland, and the fee in flats so reclaimed vests in him."<sup>3</sup>

**476.** By virtue of this ordinance the owner in fee of upland adjoining tide-waters, whether of the sea or of a tidal stream, becomes the owner also of the adjacent shore, flats, or beach one hundred rods in extent, if the tide ebbs and flows that distance; and a conveyance of upland bounded by such waters passes the grantor's title to the same extent.<sup>4</sup> This ordinance or custom

Ct. Rep. 548, per Gray, J., citing *Commonwealth v. Alger*, 7 Cush. 53, 66, and other authorities collected in *Commonwealth v. Roxbury*, 9 Gray, 451.

<sup>1</sup> *Nudd v. Hobbs*, 17 N. H. 524, 526; *Clement v. Burns*, 43 N. H. 609, 621; *Concord Manuf. Co. v. Robertson*, 66 N. H. 1, 26, 27, 25 Atl. Rep. 718.

<sup>2</sup> *Ang. Tide-Waters* (2d ed.), 236, 237; *Folsom v. Freeborn*, 13 R. I. 200, 204, 210. It would seem, however, that the owner of the upland has no right of action against any one filling up the flats by authority of the State for any public purpose. *Gerhard v. Commissioners*, 15 R. I. 334, 5 Atl. Rep. 199; *Clark v. City of Providence*, 16 R. I. 337, 15 Atl. Rep. 763.

<sup>3</sup> *Ladies' Friend Soc. v. Halstead*, 58 Conn. 144, 19 Atl. Rep. 658; *Prior v. Swartz*, 62 Conn. 132, 136-138, 25 Atl. Rep. 398. The exercise of this right is subject to all regulations the State may see fit to impose by authorizing commissioners to establish harbor lines or otherwise. *State v. Sargent*, 45 Conn. 358. But it has been intimated that it cannot be appropriated by the State to a different public use without compensation. *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. Rep. 561.

<sup>4</sup> *Maine*: *Clancey v. Houdlette*, 39 Me. 451; *Parsons v. Clark*, 76 Me. 476; *Barrows v. McDermott*, 73 Me. 441; *Low v. Knowlton*, 26 Me. 128, 45 Am. Dec. 100; *Moulton v. Libbey*, 37 Me. 472, 485, 59



does not apply to streams above the point where they are affected by the ebb and flow of the tide; but it applies wherever the tide ebbs and flows, though the water be fresh and is merely thrown back by the influx of the sea.<sup>1</sup> In these States a boundary by the sea or seashore, or beach or tide-water, *prima facie* includes the land between high and low water mark to the extent of the grantor's title.<sup>2</sup> A deed with such a boundary passes the flats adjoining the upland conveyed, though the description, both as regards the quantity of land conveyed and the length of the lines, would be satisfied by applying it to the upland alone.<sup>3</sup> A boundary by a tidal creek, the bed of which is bare at low water, *prima facie* conveys the title to the centre of the channel of the creek.<sup>4</sup> The grant of a wharf will carry with it the grantor's flats in front of the wharf to low-water mark, unless there are words in the deed that restrict its operation in respect to the land covered by the water.<sup>5</sup>

The title to an island situated within one hundred rods from

Am. Dec. 57; *Snow v. Mt. Desert Isl. Co.* 84 Me. 14, 34 Atl. Rep. 429. **Massachusetts:** *Litchfield v. Scituate*, 136 Mass. 39; *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155; *Commonwealth v. Roxbury*, 9 Gray, 451; *Commonwealth v. Alger*, 7 Cush. 53; *Sale v. Pratt*, 19 Pick. 191; *Boston v. Richardson*, 13 Allen, 146, 105 Mass. 351, 355. The owner's title extends to extreme low-water mark. *Sewall Co. v. Boston Water-Power Co.* 147 Mass. 61, 16 N. E. Rep. 782. **New Hampshire:** *Clement v. Burns*, 43 N. H. 609; *Nudd v. Hobbs*, 17 N. H. 524. **Connecticut:** There may be private ownership between high and low water mark, and use for any purpose that does not interfere with public interest. *East Haven v. Hemingway*, 7 Conn. 186; *Ladies' Friend Soc. v. Halstead*, 58 Conn. 144, 19 Atl. Rep. 658; *Nichols v. Lewis*, 15 Conn. 137.

<sup>1</sup> *Attorney-General v. Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Lapish v. Bangor Bank*, 8 Me. 85.

<sup>2</sup> *Doane v. Willcut*, 5 Gray, 328, 66 Am. Dec. 369; *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155; *Charlestown v. Tufts*, 111 Mass. 348; *Drake v. Curtis*, 1 Cush. 395; *Valentine v. Piper*, 22 Pick.

85, 33 Am. Dec. 715; *Boston v. Richardson*, 105 Mass. 351, 13 Allen, 146; *Saltonstall v. Long Wharf*, 7 Cush. 195; *Green v. Chelsea*, 24 Pick. 71; *Jackson v. Boston & W. R. Co.* 1 Cush. 575; *Hathaway v. Wilson*, 123 Mass. 359; *Litchfield v. Scituate*, 136 Mass. 39; *Harlow v. Fisk*, 12 Cush. 302; *Litchfield v. Fergusen*, 241 Mass. 97, 6 N. E. Rep. 721. **Maine:** *Montgomery v. Reed*, 69 Me. 510; *King v. Young*, 76 Me. 76; *Pike v. Monroe*, 36 Me. 309, 58 Am. Dec. 751; *Stevens v. King*, 76 Me. 197; *Erskine v. Moulton*, 66 Me. 276; *Winslow v. Patten*, 34 Me. 25; *Moore v. Griffin*, 22 Me. 350; *Snow v. Mt. Desert Isl. Co.* 84 Me. 14, 34 Atl. Rep. 429; *Babson v. Tainter*, 79 Me. 368, 10 Atl. Rep. 63.

<sup>3</sup> *Mayhew v. Norton*, 17 Pick. 357, 28 Am. Dec. 306; *King v. Young*, 76 Me. 76, 49 Am. Rep. 596.

<sup>4</sup> *Harlow v. Fisk*, 12 Cush. 302; *King v. Young*, 76 Me. 76, 49 Am. Rep. 596.

<sup>5</sup> *Central Wharf v. India Wharf*, 123 Mass. 561, 566, per Gray, C. J.; *Commonwealth v. Alger*, 7 Cush. 53; *Wheeler v. Stone*, 1 Cush. 313; *Ammidown v. Granite Bank*, 8 Allen, 285; *Ashby v. Eastern R. R. Co.* 5 Met. 368, 38 Am. Dec. 426.

the-opposite upland, there being no channel between the island and the mainland at low water, does not extend, as between the island and the mainland, unless by special grant, to any flats circling the island, except such as lie on the sea side of the island, between the island and the receded sea.<sup>1</sup>

477. There is a presumption that the grantor conveys the title to land covered by water so far as his own title extends, whether the conveyance is bounded by the sea, a tidal river, or a fresh-water stream, unless he expressly reserves the land under the water, or the terms of the deed indicate an intention to reserve it.<sup>2</sup> The presumption is similar to that already mentioned which pertains to a conveyance bounded by a highway, street, or private way. It is also a presumption founded upon a similar reason; and that reason is, that the land adjacent to the bank of a stream, or to the shore of the sea or other tidal waters, is necessary or valuable to the adjoining proprietor, but ordinarily is of no use to one who has conveyed his land bounded upon the water.

478. This presumption may always be overcome by language in the deed showing an intention not to convey any title to the land covered by water.<sup>3</sup> The grantee's title will be limited to the shore land in case he purchases by a plat which shows that the land in front of the granted land is platted into blocks which

<sup>1</sup> *Babson v. Tainter*, 79 Me. 368. Peters, C. J., said: "What right in flats, islands situated within the one hundred rods from high-water mark at the shore shall have, when not regulated by the special terms of any grant, seems not to have been very much considered in the cases. The ordinance is in very general terms. The colonial government of the mother commonwealth granted the great boon to landholders without much thought or intimation about the manner of dividing the flats among its grantees. No rule can compass all cases. The Massachusetts court has adopted different rules for different classes of cases, and has frequently had occasion to remark upon the difficulty and embarrassment attending a practical application of any construction of the ordinance. *Gray v. Deluce*, 5 Cush. 9; *Rust v. Mill Corporation*, 6 Pick. 158;

*Commonwealth v. Alger*, 7 Cush. 53, 69. . . . Our own rule has not received much commendation from other courts. *Emerson v. Taylor*, 9 Me. 42, 23 Am. Dec. 531, 537, with note; *Stockham v. Browning*, 18 N. J. Eq. 390; *Treat v. Chipman*, 35 Me. 34; *Call v. Carroll*, 40 Me. 31."

<sup>2</sup> *Boston v. Richardson*, 13 Allen, 146; *Pratt v. Lamson*, 2 Allen, 275; *Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342; *Paine v. Woods*, 108 Mass. 160; *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Dec. 641; *Starr v. Child*, 20 Wend. 149, 4 Hill, 369, 5 Denio, 599; *Carter v. Railway Co.* 26 W. Va. 644; *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91; *Houck v. Yates*, 82 Ill. 179.

<sup>3</sup> *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Morrison v. Keen*, 3 Me. 474; *People v. Madison Co.* 125 Ill. 9, 17 N. E. Rep. 147.

have been sold or reserved for sale; and he acquires no riparian rights in the unplatted land between the water blocks and navigable water; for the plat contemplates on its face that the exterior line of the outermost blocks is to be treated as the shore line, and that the rights usually appurtenant to riparian land attach to these blocks.<sup>1</sup>

479. Of course the owner in any sale may sever the upland from the flats, selling either without the other at his pleasure.<sup>2</sup> He may by appropriate words restrict his conveyance to the line of high water.<sup>3</sup> Thus a deed calling for a line running to the shore or bank of a tide-river and thence along the bank or shore, or for a line running on the beach or shore of the sea, excludes the shore or flats, which is the term applied to the ground between high and low water mark.<sup>4</sup> The bank or shore becomes a monument limiting the land thereto when the deed clearly shows this to be the intention of the grantor. But when the land is described as bounded by a monument standing on the bank of a tidal stream, or on the shore of the sea and thence by the stream or sea, the monument does not generally restrict the boundary to the bank or shore.<sup>5</sup> Moreover, while a boundary by the shore is ordinarily a boundary by high-water mark, yet it may appear from the whole instrument and from monuments referred to that the term was used as importing low-water mark. The word may always be controlled by other expressions used in the conveyance.<sup>6</sup> A deed conveying a parcel of land bounded by

<sup>1</sup> *Gilbert v. Emerson*, 55 Minn. 254, 261, 56 N. W. Rep. 818. *Mitchell, J.*, said: "The platting of these water-blocks, and conveying them with reference to the plat, manifestly contemplated reclaiming them and filling them in, or otherwise improving them for use; and we cannot see what difference it makes whether this had been done before the grantor conveyed, or was only in contemplation."

<sup>2</sup> *Ladies' Friend Society v. Halstead*, 58 Conn. 144, 19 Atl. Rep. 658; *Erskine v. Moulton*, 66 Me. 276, 84 Me. 243, 24 Atl. Rep. 841; *Stone v. Augusta*, 46 Me. 127; *Knox v. Pickering*, 7 Me. 106; *Deering v. Long Wharf*, 25 Me. 51; *Porter v. Sullivan*, 7 Gray, 441, 447, per *Shaw, C. J.*; *Lufkin v. Haskell*, 3 Pick. 356; *Valentine v. Piper*, 22 Pick. 85, 94, 33

Am. Dec. 715; *Storer v. Freeman*, 6 Mass. 435; *Palmer v. Farrell*, 129 Pa. St. 162, 18 Atl. Rep. 761.

<sup>3</sup> *Duulap v. Stetson*, 4 Mason, 349; *Nickerson v. Crawford*, 16 Me. 245.

<sup>4</sup> *Montgomery v. Reed*, 69 Me. 510; *Nickerson v. Crawford*, 16 Me. 245; *Bradford v. Cressey*, 45 Me. 9; *Stone v. Augusta*, 46 Me. 127; *Brown v. Heard*, 85 Me. 294, 27 Atl. Rep. 182; *Litchfield v. Ferguson*, 141 Mass. 97, 6 N. E. Rep. 721; *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155; *Chapman v. Edmands*, 3 Allen, 512; *Niles v. Patch*, 13 Gray, 254; *Litchfield v. Scituate*, 136 Mass. 39; *East Hampton v. Kirk*, 68 N. Y. 459, 463.

<sup>5</sup> *Erskine v. Moulton*, 66 Me. 276; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751.

<sup>6</sup> *Hathaway v. Wilson*, 123 Mass. 359,

the shore of the sea at high-water mark, "including all the privileges of the shore to low-water mark," was held to pass the fee in the land to low-water mark.<sup>1</sup>

Under a statute giving the owner of land on tide-water the title to low-water mark, a conveyance by metes and bounds which are substantially coincident with high-water mark carries all the rights of the grantor to the strip lying between high and low water mark.<sup>2</sup>

If land be described as running "to a cove and thence along the margin of the cove," the grant excludes adjoining flats.<sup>3</sup> The same effect follows when the call is "on the west bank of the creek;"<sup>4</sup> also where the words are "by the bank of the stream."<sup>5</sup>

480. The land covered by fresh-water streams not navigable is *prima facie* the property of the riparian proprietors, *usque ad filum aquæ*.<sup>6</sup> If the same person owns the land on both sides of the stream, he owns the entire river-bed so far as his lands extend.<sup>7</sup> One who owns the bank on one side of the stream only, owns the bed of the stream *ad medium filum aquæ*. By the common law, even such rivers as the Mississippi, the Missouri, the Ohio, the Hudson, and the Connecticut and other great rivers, above the point where the tide ebbs and flows, are not navigable rivers, though they are navigable in fact; and therefore, where such a river forms the boundary of land the grantee becomes a riparian owner, and his grant extends to the centre of the river.<sup>8</sup>

361, per Gray, C. J.; *Litchfield v. Scituate*, 136 Mass. 39.

<sup>1</sup> *Dillingham v. Roberts*, 75 Me. 469, 46 Am. Rep. 419.

<sup>2</sup> *McDonald v. Whitehurst*, 47 Fed. Rep. 757.

<sup>3</sup> *Nickerson v. Crawford*, 16 Me. 245.

<sup>4</sup> *Bradford v. Cressey*, 45 Me. 9.

<sup>5</sup> *Stone v. Augusta*, 46 Me. 127.

<sup>6</sup> Lord Hale, in Harg. Law Tracts, 5; *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *Murphy v. Ryan*, 2 Ir. Com. Law, 143; *Ewing v. Colquhoun*, 2 App. Cas. 839. "The rule of the common law on this point appears to have been followed in all the original States,—except in Pennsylvania, Virginia, and North Carolina, and except as to great rivers, such as the Hudson, the Mohawk, and the St. Law-

rence in New York,—as well as in Ohio, Illinois, Michigan, and Wisconsin. But it has been wholly rejected as to rivers navigable in fact, in Pennsylvania, Virginia, and North Carolina, and in most of the new States." *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, per Gray, J.; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838.

<sup>7</sup> *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *People v. Jones*, 112 N. Y. 597, 20 N. E. Rep. 577; *Dela-plaine v. Chicago & N. W. Ry. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Gavit v. Chambers*, 3 Ohio, 495; *Benner v. Platter*, 6 Ohio, 504; *Rockwell v. Baldwin*, 53 Ill. 19.

<sup>8</sup> *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337; *Jones v. Soulard*, 24

481. In many States the common-law rule as regards navigable lakes and rivers has been changed, and in its place the civil-law rule has been adopted, which recognizes as navigable all streams and lakes which are really so, though they are not tide-water rivers.<sup>1</sup> This has now become the prevailing doctrine in

How. 41; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, an Illinois case. **Connecticut**: *Adams v. Pease*, 2 Conn. 481. **Illinois**: *Fuller v. Dauphin*, 124 Ill. 542, 16 N. E. Rep. 917; *Houck v. Yates*, 82 Ill. 179; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Cobb v. Lavalley*, 89 Ill. 331, 31 Am. Rep. 91; *Braxton v. Bressler*, 64 Ill. 488; *Beckman v. Kreamer*, 43 Ill. 447; *Chicago & Pac. R. Co. v. Stein*, 75 Ill. 41; *Chicago v. Laffin*, 49 Ill. 172; *Butternuth v. St. Louis Bridge Co.* 123 Ill. 535, 550, 17 N. E. Rep. 439; *Trustees v. Schroll*, 120 Ill. 509, 12 N. E. Rep. 243, 60 Am. Rep. 575; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196. **Maine**: *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Dec. 641. **Maryland**: *Browne v. Kennedy*, 5 H. & J. 195, 9 Am. Dec. 503. **Massachusetts**: *Commonwealth v. Vincent*, 108 Mass. 441, 447; *Commonwealth v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Knight v. Wilder*, 2 Cush. 199, 209, 48 Am. Dec. 660; *Commonwealth v. Alger*, 7 Cush. 53, 97, 101, per Shaw, C. J.; *Lunt v. Holland*, 14 Mass. 149. **Michigan**: *Backus v. Detroit*, 49 Mich. 110, 13 N. W. Rep. 380, 43 Am. Rep. 447; *Watson v. Peters*, 26 Mich. 508; *Ryan v. Brown*, 18 Mich. 196; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Webber v. Père Marquette Boom Co.* 62 Mich. 626, 30 N. W. Rep. 469. **Mississippi**: *The Magnolia v. Marshall*, 39 Miss. 109; *Morgan v. Reading*, 3 S. & M. 366. **New Hampshire**: *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88. **New Jersey**: *Attorney-General v. Del. & B. Brook R. Co.* 27 N. J. Eq. 631; *Kanouse v. Slockbower*, 48 N. J. Eq. 42, 21 Atl. Rep. 197. **North Carolina**: *Bond v. Wool*, 107 N. C. 139, 149, 12 S. E. Rep. 281; *State v. Glen*, 7 Jones L. 321, 325; *Williams v. Buchanan*, 1 Ired. L. 535, 35 Am. Dec. 760. **Ohio**: *June v. Purcell*, 36 Ohio St. 396; *Gavit v. Chambers*, 3 Ohio, 496; *Blanchard v. Porter*, 11 Ohio, 138; *Walker v. Public Works*, 16 Ohio, 540. **Oregon**: *Moore v. Willamette, T. & L. Co.* 7 Oreg. 355. **South Carolina**: *McCullough v. Wall*, 4 Rich. 68, 53 Am. Dec. 755; *State v. Columbia*, 27 S. C. 137, 3 S. E. Rep. 55. **Tennessee**: *Holbert v. Edens*, 5 Lea, 204, 40 Am. Rep. 26. **Wisconsin**: *Norcross v. Griffiths*, 65 Wis. 599, 27 N. W. Rep. 606, 56 Am. Rep. 642; *Jones v. Pettibone*, 2 Wis. 308.

<sup>1</sup> **Alabama**: *Hess v. Cheney*, 83 Ala. 251, 3 So. Rep. 791; *Williams v. Glover*, 66 Ala. 189; *Bullock v. Wilson*, 2 Port. 436. **California**: *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210, 71 Cal. 134, 11 Pac. Rep. 873; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674. **Indiana**: *Martin v. Evansville*, 32 Ind. 85. **Iowa**: *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Dubuque R. R. Co.* 32 Iowa, 106, 7 Am. Rep. 176; *Wood v. Railroad Co.* 60 Iowa, 456, 15 N. W. Rep. 284; *Barney v. Keokuk*, 94 U. S. 324. **Kansas**: *Wood v. Fowler*, 26 Kans. 682, 689, 40 Am. Rep. 330. **Kentucky**: *Thurman v. Morrison*, 14 B. Mon. 367. **Minnesota**: *Lamprey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139. **Missouri**: *Benson v. Morrow*, 61 Mo. 345, 351; *Meyers v. St. Louis*, 8 Mo. App. 266. **North Carolina**: *Wilson v. Forbes*, 2 Dev. 30; *Collins v. Benbury*, 3 Ired. L. 277, 38 Am. Dec. 722; *State v. Glen*, 7 Jones L. 321; *Broadnax v. Baker*, 94 N. C. 675, 681, 55 Am. Rep. 633; *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242; *Fagan v. Armistead*, 11 Ired. 433; *State v. Eason*, 114 N. C. 787, 19 S. E. Rep. 88. **New York**: *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *People v. Jones*, 112 N. Y. 597, 20 N. E. Rep. 577;

this country. The earliest judicial statement of it is found in a case before the Supreme Court of Pennsylvania in 1807, in which Chief Justice Tilghman, after observing that the rule of the common law upon the subject had not been adopted in Pennsylvania, said: "The common-law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers. Now, the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert that by navigable rivers are meant rivers in which there is no flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches."<sup>1</sup>

Congress, by early legislation with regard to the survey of public lands, recognized the same rule, declaring that navigable rivers shall be public highways.<sup>2</sup>

In view of this legislation the Federal courts, in construing grants of the United States, hold that the common-law rules of riparian ownership do not apply to navigable streams, even in

*People v. Canal Appraisers*, 33 N. Y. 461; *Canal Commissioners v. People*, 5 Wend. 423, 17 Wend. 571. See *Commissioners v. Kempshall*, 26 Wend. 404. **Pennsylvania**: The common-law doctrine was never recognized here. *Wood v. Appal*, 63 Pa. St. 210; *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112, 84 Am. Dec. 527. In the latter case Read, J., delivering the opinion, said: "We are aware that, by the common law of England, such streams as the Mississippi, the Missouri, the rivers Amazon and Platte, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges, and the Indus were not navigable rivers, but were the subject of private property; whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded Continental Eu-

rope and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so; and this common-sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth."

The Supreme Court of the United States has recognized these precedents as binding in cases coming from that State. *Rundle v. Canal Co.* 14 How. 80, 91, 93, 94; *Fisher v. Haldeman*, 20 How. 186, 194. **South Carolina**: *Cates v. Wallington*, 1 McCord, 580. **Tennessee**: *Stuart v. Clark*, 2 Swan, 9; *Elder v. Burrus*, 6 Humph. 358. **West Virginia**: *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. Rep. 42.

<sup>1</sup> *Carson v. Blazer*, 2 Binn. 475, 477, 478, 4 Am. Dec. 463.

<sup>2</sup> Act of May 18, 1796, ch. 29, § 9, 1 Stats. at Large, 468; R. S. § 2476.

those States in which this rule has been adopted.<sup>1</sup> "But whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficiency of the grants, or the use and enjoyment of the property by the grantee. As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited, according to the law of the State, either to low or high water mark, or will extend to the middle of the stream."<sup>2</sup> The question, whether a riparian owner holds the fee to the middle thread of the stream or the river's bank, is governed by the law of the States. It depends upon the laws of each State to what extent the prerogative of the State to lands under water shall extend; and therefore it happens that the Mississippi River, by the settled policy of the State of Iowa, is regarded as a navigable river, and the title of a riparian owner on the banks of this river extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State; while on the other side of the same great river, in the States of Illinois and Mississippi, the common-law doctrine prevails, and in those States the title of the riparian proprietor extends to the middle of the current.<sup>3</sup>

**482. A division of waters into public and private waters has been adopted in some recent decisions, and undoubtedly the tendency is to extend and assert public rights as against private ownership in lakes and rivers, without much regard to any test or definition of navigability. The tendency is well illustrated in a recent important decision of the Supreme Court of Minnesota, in which Mr. Justice Mitchell says: "In this country, while still retaining the common-law classification of navigable and non-navigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the**

<sup>1</sup> *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210; *Railroad Co. v. Schurmeir*, 7 Wall. 272, affirming *Schurmeir v. Railroad Co.* 10 Minn. 82, 88 Am. Dec. 59.

<sup>2</sup> *Packer v. Bird*, 137 U. S. 661, 669, per Field, J.

<sup>3</sup> *St. Louis v. Rutz*, 138 U. S. 226, 11

Sup. Ct. Rep. 337; *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210; *St. Louis v. Myers*, 113 U. S. 566, 5 Sup. Ct. Rep. 640; *Barney v. Keokuk*, 94 U. S. 324; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838.

meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of 'navigability' in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. . . . If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature and adopt the classification of public waters and private waters. But, however that may be, we are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable within the reason and spirit of the common-law rule. When the waters of any of them have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters, and their former beds, under the principles already announced, would become the private property of the riparian owners."<sup>1</sup>

A boundary upon a public navigable river or lake is a boundary by the edge of the water at ordinary low-water mark; that is, the deed with such boundary passes to the grantee the title to the land between such stage of the water and high-water mark.<sup>2</sup>

In accordance with this rule, where a navigable river is one of the boundaries of a municipality, the low-water line, and not the

<sup>1</sup> *Lamprey v. State*, 52 Minn. 181, 199, Rep. 791; *Williams v. Glover*, 66 Ala. 200, 53 N. W. Rep. 1139. 189.

<sup>2</sup> *Hess v. Cheney*, 83 Ala. 251, 3 So.



thread of the stream, is the boundary, in the absence of express language to the contrary in the act of incorporation.<sup>1</sup>

483. The rule to determine the division line between adjoining holdings in the shallow waters of the ocean, or of a navigable river or lake, of owners of land bordering thereon, and located on a curved or irregular shore, is (1) to measure the whole extent of the shore line, and compute how many rods, yards, or feet each riparian proprietor owns thereon; (2) to divide the navigable water line into as many equal parts as such shore line contains rods, yards, or feet, and then appropriate to each proprietor as many of such parts of such navigable water line as he owns rods, yards, or feet of the shore line; and (3) to draw a line from the point of division on the shore line to the point thus determined as the point of division on the navigable water line. This general rule was early adopted in Massachusetts, and has since been adhered to there, and adopted by the United States courts, and the courts of New York, Michigan, and Wisconsin.<sup>2</sup>

484. A sale of land bounded on a non-tidal river (except where the common law has been changed in respect to rivers

<sup>1</sup> *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Ogdeusburgh v. Lyon*, 7 Lans. 215; *State v. Eason*, 114 N. C. 787, 19 S. E. Rep. 88; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. Rep. 42.

<sup>2</sup> *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276; *Rust v. Mill Corp.* 6 Pick. 158; *Sparhawk v. Bullard*, 1 Met. 95; *Hopkins Academy v. Dickinson*, 9 Cush. 552; *Wonson v. Wonson*, 14 Allen, 71, 85; *Johnston v. Jones*, 1 Black, 209, 223; *Jones v. Johnston*, 18 How. 150; *O'Donnell v. Kelsey*, 10 N. Y. 412; *Nott v. Thayer*, 2 Bosw. 10; *Blodgett, &c. Co. v. Peters*, 87 Mich. 498, 506, 507, 49 N. W. Rep. 917; *Northern Pine Land Co. v. Bigelow*, 84 Wis. 157, 54 N. W. Rep. 496; *Menasha Ware Co. v. Lawson*, 70 Wis. 600, 36 N. W. Rep. 412. In the Michigan case *Champlin, C. J.*, speaking for the court, said: "The object to be kept in view in cases of this kind is to secure to each proprietor access to navigable water, and an equal share of the dockage line at navigable water in proportion to his share on the

original shore line of the bay. . . . We cannot deal with Green Bay as we would with the rivers in this State, where the lines are to be drawn at right angles to the thread of the stream. The rules laid down for the boundaries of owners of land bordering upon the ocean and great inland seas are more proper for the disposition of the case before us." And see *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182; *Clark v. Campau*, 19 Mich. 325; *Batchelder v. Keniston*, 51 N. H. 496; *Aborn v. Smith*, 12 R. I. 370; *Emerson v. Taylor*, 9 Me. 42; *Newton v. Eddy*, 23 Vt. 319; *Delaware, L. & W. R. Co. v. Hannon*, 37 N. J. L. 276; *Stockham v. Browning*, 18 N. J. Eq. 390. In *Attorney-General v. Boston Wharf Co.* 12 Gray, 553, 558, the court say that, "in general, where there are no circumstances or peculiarities in the formation of the shore or the course of the channel, the lines of division are to be made to the channel in the most direct course from the lateral boundaries of the several tracts of upland to which the flats are appended."

navigable in fact) passes the title *ad medium flum aquæ*, unless there is something in the deed to indicate an intention to restrict the title to the bank of the river.<sup>1</sup> The effect of the deed depends upon its terms and the presumptions arising therefrom, unless the terms used are uncertain or ambiguous, so that parol evidence is admissible to explain them.<sup>2</sup>

485. By the thread of the stream is strictly meant the centre of the main channel of the stream.<sup>3</sup> Ordinarily the

<sup>1</sup> *Micklethwait v. Newlay Bridge Co.* 33 Ch. D. 133; *Wright v. Howard*, 1 Sim. & Stu. 190, 203; *Devonshire v. Patkinson*, L. R. 20 Q. B. D. 263; *Thomas v. Hatch*, 3 Sumn. 170; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808. **Colorado**: *Denver v. Pearce*, 13 Colo. 383, 22 Pac. Rep. 774. **Connecticut**: *Adams v. Pease*, 2 Conn. 481; *Warner v. Southworth*, 6 Conn. 471. **Illinois**: *Houck v. Yates*, 82 Ill. 179; *Braxton v. Bressler*, 64 Ill. 488; *Trustees v. Schroll*, 120 Ill. 509, 12 N. E. Rep. 243, 60 Am. Rep. 575; *People v. Madison Co.* 125 Ill. 9, 17 N. E. Rep. 147; **Indiana**: *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655; *Brophy v. Richeson* (Ind.), 36 N. E. Rep. 424; *Indiana v. Milk*, 11 Biss. 197, 11 Fed. Rep. 389; *Ridgway v. Ludlow*, 58 Ind. 248; *Edwards v. Ogle*, 76 Ind. 302. **Kentucky**: *Berry v. Snyder*, 3 Bush, 266, 96 Am. Dec. 219; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372, 1 S. W. Rep. 765. **Maine**: *Warren v. Thomaston*, 75 Me. 329, 46 Am. Rep. 397; *Pike v. Monroe*, 36 Me. 309, 58 Am. Dec. 751; *Granger v. Avery*, 64 Me. 292; *Nickerson v. Crawford*, 16 Me. 245; *Hathorn v. Stinson*, 10 Me. 224, 227, 25 Am. Dec. 228; *Lapish v. Bangor Bank*, 8 Me. 85; *Morrison v. Keen*, 3 Me. 474. **Massachusetts**: *King v. King*, 7 Mass. 496; *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342; *Commonwealth v. Alger*, 7 Cush. 53. **Michigan**: *Twogood v. Hoyt*, 42 Mich. 609, 4 N. W. Rep. 445; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Norris v. Hill*, 1 Mich. 202; *Moore v. Sanborne*, 2 Mich. 519. **Minnesota**: *Lamprey v. State*, 52 Minn. 181, 53 N.

W. Rep. 1139. **New Hampshire**: *State v. Canterbury*, 28 N. H. 195; *Greenleaf v. Kilton*, 11 N. H. 530; *State v. Gilmanton*, 9 N. H. 461; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88; *Sleeper v. Laco-*  
*nia*, 60 N. H. 201, 49 Am. Rep. 311; *Nich-*  
*ols v. Suncook Manuf. Co.* 34 N. H. 345. **New Jersey**: *Kanouse v. Stockbower*, 48 N. J. Eq. 42, 21 Atl. Rep. 197. **New York**: *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Dec. 393; *People v. Jones*, 112 N. Y. 597, 20 N. E. Rep. 577; *Morgan v. King*, 35 N. Y. 454; *People v. Canal Appraisers*, 13 Wend. 355; *Canal Commis-*  
*sioners v. People*, 5 Wend. 423; *Canal Appraisers v. People*, 17 Wend. 571. **Ohio**: *Niehaus v. Shepherd*, 26 Ohio St. 40; *Hopkins v. Kent*, 9 Ohio, 13; *Gavit v. Chambers*, 3 Ohio, 495. **Rhode Island**: *Hughes v. Providence & W. R. Co.* 2 R. I. 508. **South Carolina**: *McCullough v. Wall*, 4 Rich. 68, 53 Am. Dec. 715. **Tennessee**: *Martin v. Nance*, 3 Head, 649. **Virginia**: *Crenshaw v. Slate River Co.* 6 Rand, 245; *Hayes v. Bowman*, 1 Rand, 417. **West Virginia**: *Carter v. Railway Co.* 26 W. Va. 644; *Camden v. Creel*, 4 W. Va. 365. **Wisconsin**: *Norcross v. Griffiths*, 65 Wis. 599, 27 N. W. Rep. 606, 56 Am. Rep. 642; *Arnold v. Elmore*, 16 Wis. 509; *Chandos v. Mack*, 77 Wis. 573, 46 N. W. Rep. 803.

<sup>2</sup> See §§ 338, 339. In *Devonshire v. Patkinson*, L. R. 20 Q. B. 263, the presumption that the conveyance included the bed of the river *usque ad medium flum* was rebutted by proof of surrounding circumstances.

<sup>3</sup> *Cessill v. State*, 40 Ark. 501.

middle line between the shores is regarded as the thread of the stream, taking it in the natural and ordinary stage of the water, irrespective of the depth of the channel.<sup>1</sup> Moreover, it is the middle line of the stream for the time being that is the boundary. The boundary line may change from time to time by the gradual wearing away of the bank upon one side of the stream and the depositing of the soil upon the opposite side, and the land before covered by water belongs to the riparian proprietor,<sup>2</sup> though, if the bed of the stream be suddenly changed by a freshet, the boundary is not changed; the ownership remains according to former bounds.<sup>3</sup>

If one owning land on both sides of a river grants the land on the westerly side of it, bounding it by the river, the grant includes an island lying between the westerly bank and the middle of the main channel of the river.<sup>4</sup> If such owner in making a grant excepts an island, he makes the thread of the channel between the island and the mainland the boundary.<sup>5</sup> If an island grad-

<sup>1</sup> *Hopkins Academy v. Dickinson*, 9 Cush. 552; *Warren v. Thomaston*, 75 Me. 329, 46 Am. Rep. 397; *Boscawen v. Canterbury*, 23 N. H. 188; *McCullough v. Wall*, 4 Rich. 68, 53 Am. Dec. 715.

<sup>2</sup> *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. Rep. 396; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337; *New Orleans v. United States*, 10 Pet. 662, 717; *Jones v. Souland*, 24 How. 41; *Banks v. Ogden*, 2 Wall. 57; *Saulet v. Shepherd*, 4 Wall. 502; *St. Clair v. Lovington*, 23 Wall. 46; *Jefferis v. Land Co.* 134 U. S. 178, 10 Sup. Ct. Rep. 518; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Warren v. Chambers*, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23; *Lovington v. St. Clair*, 64 Ill. 56, 16 Am. Rep. 516; *Butternuth v. Bridge Co.* 123 Ill. 535, 17 N. E. Rep. 439; *Steele v. Sanchez*, 72 Iowa, 65, 33 N. W. Rep. 366; *Kraut v. Crawford*, 18 Iowa, 549, 87 Am. Dec. 414; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Primm v. Walker*, 38 Mo. 94, 98; *Mincke v. Skinner*, 44 Mo. 92; *Lammers v. Nissen*, 4 Neb. 245; *Gill v. Lydick*, 40 Neb. 508, 59 N. W. Rep. 104; *Murry v. Sermon*, 1 Hawks (N. C.), 56; *Wilhelm v.*

*Burleyson*, 106 N. C. 381, 11 S. E. Rep. 590; *Niehaus v. Shepherd*, 26 Ohio St. 40; *Lamb v. Rickets*, 11 Ohio, 311; *Collins v. State*, 3 Tex. Ct. App. 323; *Jones v. Pettibone*, 2 Wis. 308; *Walker v. Shephardson*, 4 Wis. 486, 65 Am. Dec. 324.

The fact that accretions are due wholly or in part to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. *Tatum v. St. Louis (Mo.)*, 28 S. W. Rep. 1002.

<sup>3</sup> *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. Rep. 396; *Lynch v. Allen*, 4 Dev. & B. 62; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Holbrook v. Moore*, 4 Neb. 437; *Henning v. Bennett*, 63 Hun, 592, 18 N. Y. S. 645; *Butternuth v. St. Louis Bridge Co.* 123 Ill. 535; *Degman v. Elliott (Ky.)*, 8 S. W. Rep. 10.

<sup>4</sup> *Miller v. Mann*, 55 Vt. 475; *Branham v. Turnpike Co.* 1 Lea, 704; *Walker v. Board of Works*, 16 Ohio, 540; *Watson v. Peters*, 26 Mich. 508. So in case of a navigable river, *Missouri v. Kentucky*, 11 Wall. 395.

<sup>5</sup> *Stolp v. Hoyt*, 44 Ill. 219.

ually forms in the bed of a river wholly one side of the thread of the stream, it is the property of the riparian owner on that side;<sup>1</sup> but if the island is so situated that it is partly on one side and partly on the other of the thread of the river, it belongs in severalty to the proprietors on each side, the division line being the thread of the old river before the formation of the island.<sup>2</sup> So, of course, if a point of land on one side is cut off, making an island, this belongs to the original owner.

If the old bed of the river, being gradually deserted by the current, fills up and new land is formed, this belongs to the riparian proprietors on each side, the division line being the thread of the old river.<sup>3</sup> But if the bed of the river, as it existed at the time of the grant, cannot be found or traced, the courses and distances of a survey giving the meander line of the river may be resorted to.<sup>4</sup>

The right of the riparian proprietor to alluvion, or accretions to his land through the gradual action of the water, is everywhere admitted. The rule applies equally to lands bounding on tide-waters or on fresh waters. It applies to the king or the state equally as to private persons; and it is independent of the law governing the title in the soil covered by the water.<sup>5</sup>

**486.** If there are two or more channels, the middle line of the channel having the greater depth of water, and being the one generally used for the purposes of navigation, is regarded as the thread of the stream, though the greater quantity of water may flow in the other channel.<sup>6</sup> If there be a main channel through

<sup>1</sup> *Jones v. Soulard*, 24 How. 41.

<sup>2</sup> *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337; *Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342; *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276; *McCullough v. Wall*, 4 Rich. 68, 53 Am. Dec. 715; *Gerrish v. Clough*, 48 N. H. 9.

<sup>3</sup> *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Warren v. Chambers*, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23; *St. Louis v. Mo. P. Ry. Co.* 114 Mo. 13, 21 S. W. Rep. 202; *Buse v. Russell*, 86 Mo. 209; *St. Louis Public Schools v. Risley*, 40 Mo. 356; *Victoria v. Schott* (Tex. Civ. App.), 29 S. W. Rep. 681.

<sup>4</sup> *Martin v. Cooper*, 87 Cal. 97, 25 Pac. Rep. 262.

<sup>5</sup> *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, per Gray, J., citing *Lord Hale* in *Harg. Law Tracts*, pp. 5, 14, 28; *Rex v. Yarborough* in the King's Bench, 3 Barn. & C. 91, and 4 Dowl. & R. 790, and in the House of Lords, 1 Dow. & C. 178, 2 Bligh, N. S. 147, and 5 Bing. 163; *Doe v. East India Co.* 10 Moore P. C. 140; *Foster v. Wright*, 4 C. P. Div. 438; *Handly v. Anthony*, 5 Wheat. 374, 380; *Jefferis v. Land Co.* 134 U. S. 178, 189-193, 10 Sup. Ct. Rep. 518; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. Rep. 396; *Minto v. Delaney*, 7 Oreg. 337.

<sup>6</sup> *Chicago & N. W. Ry. Co. v. Clinton*

which the water flows at all times, and an auxiliary channel which furnishes a passage for surplus water in times of freshet, the centre of the main channel is the thread of the stream.<sup>1</sup>

487. If, however, the course of a river is changed by digging an artificial channel, a deed of land bounded by the river may mean the river as it ran in its old channel. Thus where, before the making of a deed of land on the north side of a river, the owners of the land on the south side had dug a channel through a part of the grantor's land, and the river changed its course to the artificial channel, so that it ran in a straight line, the old channel being a bow, leaving a strip of land belonging to the grantor lying between the old channel and the new channel, his deed bounding upon the river was held to convey the land to the old river-bed, and to include the strip in question.<sup>2</sup>

488. The owner may, however, sell or reserve his title to the soil in the bed of the river, separate from the upland, or the upland without the bed of the river.<sup>3</sup> It is only necessary to use such terms in describing the land that the ordinary presumption shall not apply. He may convey his land bounding it by a

(Iowa), 55 N. W. Rep. 462; Iowa v. Illinois, 147 U. S. 1, 13 Sup. Ct. Rep. 239; Jones v. Soulard, 24 How. 41; Schools v. Risley, 10 Wall. 91; Graves v. Fisher, 5 Me. 69, 17 Am. Dec. 203; Keokuk & H. Bridge Co. v. People, 145 Ill. 596, 34 N. E. Rep. 482; Dunlieth & D. Bridge Co. v. Dubuque, 55 Iowa, 558, 8 N. W. Rep. 443; Butternuth v. Bridge Co. 123 Ill. 535, 17 N. E. Rep. 439; Benner v. Platter, 6 Ohio, 504; Branham v. Turupike Co. 1 Lea, 704.

<sup>1</sup> Pike v. Hood (N. H.), 27 Atl. Rep. 139; Claremont v. Carleton, 2 N. H. 369, 9 Am. Dec. 88; Greenleaf v. Kilton, 11 N. H. 530; State v. Canterbury, 28 N. H. 195, 219-221; Nichols v. Manufacturing Co. 34 N. H. 345, 349; Kimball v. Schoff, 40 N. H. 190; Cessill v. State, 40 Ark. 501; Lunt v. Holland, 14 Mass. 149; Missouri v. Kentucky, 11 Wall. 395; Crooker v. Bragg, 10 Wend. 260.

<sup>2</sup> Macdonald v. Morrill, 154 Mass. 270, 28 N. E. Rep. 259. Holmes, J., said: "There was such a latent ambiguity that

the jury would have been warranted in finding that the deed meant the river *de jure*, so to speak, and not the river *de facto*. See Waterman v. Johnson, 13 Pick. 261, 267; Gerrish v. Towne, 3 Gray, 82, 88, 89; Paine v. Woods, 108 Mass. 160, 171; Emery v. Webster, 42 Me. 204, 66 Am. Dec. 274; Hill v. Evans, 4 De Gex, F. & J. 288, 293, *et seq.*, 31 L. J. Ch. 457, 460, *et seq.*; Betts v. Menzies, 10 H. L. Cas. 117, 152, 154; Bischoff v. Wethered, 9 Wall. 812, 816; Altham's Case, 8 Coke, 150 b, 155 b."

<sup>3</sup> People v. Jones, 112 N. Y. 597, 20 N. E. Rep. 577; Knight v. Wilder, 2 Cush. 199, 48 Am. Dec. 660; Denver v. Pearce, 13 Colo. 383, 22 Pac. Rep. 774; Watson v. Peters, 26 Mich. 508; Church v. Meeker, 34 Conn. 421; Ladies' Friend Soc. v. Halstead, 58 Conn. 144, 19 Atl. Rep. 658; Simons v. French, 25 Conn. 346; Smith v. Ford, 48 Wis. 116, 164, 2 N. W. Rep. 134, 4 N. W. Rep. 462; Norcross v. Griffiths, 65 Wis. 599, 27 N. W. Rep. 606, 56 Am. Rep. 642.

river at high-water mark or at low-water mark.<sup>1</sup> A boundary on or along the "bank of" a stream, or "the shore" of a stream, instead of on or along the stream, is generally held to restrict the title to the water's edge, at low-water mark.<sup>2</sup> Where a line is described as running across a brook to a monument placed on its farther bank, and the boundary is thence down said brook to a stake and stones on said bank, the boundary is along the bank of the brook, and not by the centre line of the stream.<sup>3</sup>

Where the language of a deed shows a manifest intention to stop at the water's edge, it will prevail over the general presumption. The intention of the party is the real object sought. If

<sup>1</sup> *Cook v. McClure*, 58 N. Y. 437; *Hopkins v. Kent*, 9 Ohio, 13; *Lamb v. Rickets*, 11 Ohio, 311; *Seneca Nation v. Knight*, 23 N. Y. 498; *Halsey v. McCormick*, 13 N. Y. 296; *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Rockwell v. Baldwin*, 53 Ill. 19; *Allen v. Weber*, 80 Wis. 531, 50 N. W. Rep. 514; *Jones v. Parker*, 99 N. C. 18.

<sup>2</sup> *Howard v. Ingersoll*, 13 How. 381; *Handly v. Anthony*, 5 Wheat. 374; *Dunlap v. Stetson*, 4 Mason, 349; *Thomas v. Hatch*, 3 Sumn. 170; *Cary v. Daniels*, 5 Met. 236; *Crittenton v. Alger*, 11 Met. 281; *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Bradford v. Cressey*, 45 Me. 9; *Stone v. Augusta*, 46 Me. 127; *Halsey v. McCormick*, 13 N. Y. 296; *Child v. Starr*, 4 Hill, 369; *Starr v. Child*, 20 Wend. 149, 5 Denio, 599; *Yates v. Van De Bogert*, 56 N. Y. 526; *Babcock v. Utter*, 1 Abb. Dec. 27; *Rockwell v. Baldwin*, 53 Ill. 19; *People v. Supervisors*, 125 Ill. 9; *Daniels v. Cheshire R. R. Co.* 20 N. H. 85; *Watson v. Peters*, 26 Mich. 508; *Carter v. Railway Co.* 26 W. Va. 644; *Martin v. Nance*, 3 Head, 649; *Holbert v. Edens*, 5 Lea, 204, 209, 40 Am. Rep. 26; *Holden v. Chandler*, 61 Vt. 291, 18 Atl. Rep. 310; *Chandos v. Mack*, 77 Wis. 573, 46 N. W. Rep. 803; *Greene v. Nunemacher*, 36 Wis. 50; *Allen v. Weber*, 80 Wis. 531, 50 N. W. Rep. 514. In this last case *Orton, J.*, cites the following cases in which the line is limited by the description, and no part of the bed of the

stream is conveyed: "Thence northeasterly up the west bank of Pine Creek." *Murphy v. Copeland*, 51 Iowa, 515, 58 Iowa, 409, 43 Am. Rep. 118, 1 N. W. Rep. 691, 10 N. W. Rep. 786. "To and along the bank." *Halsey v. McCormick*, 13 N. Y. 296; *People v. Supervisors*, 125 Ill. 9, 17 N. E. Rep. 147. "As far as high-water mark" is the outer line of the overflow of a mill-pond so described in the conveyance. *Jones v. Parker*, 99 N. C. 18, 5 S. E. Rep. 383. "To the Genesee River, thence northwardly along the shore of said river." *Starr v. Child*, 20 Wend. 149. In *Murphy v. Copeland*, 51 Iowa, 515, 1 N. W. Rep. 691, it was held that "along the bank" was equivalent to "along low-water mark;" and the same in *Halsey v. McCormick*, 13 N. Y. 296. In *Cook v. McClure*, 58 N. Y. 437, the language is: "To a stake near the high-water mark of the pond, running thence along the high-water mark of said pond, to," etc.; and it was held that the line was limited at high-water mark, and would not extend even to low-water mark. This case is exactly in point. In *Bradford v. Cressey*, 45 Me. 9, the language is: "Thence east until it strikes the creek on which the mill stands; thence southwesterly on the west bank of said creek;" and it was held that "the grantee was restricted to the bank of the creek."

<sup>3</sup> *Nichols v. Howland*, 52 Hun. 287, 5 N. Y. Supp. 252; *Kingsland v. Chittenden*, 6 Lans. 15.

the meaning is not clear, resort is had to rules of construction. "If the intention is still doubtful, the deed may be examined in the light of the circumstances attending its execution, such as the actual condition, situation, and occupation of the property granted. But the intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds the construction must be upon the view and comparison of the whole instrument."<sup>1</sup>

**489.** As bearing upon the construction of the deed in this respect, other instruments may be considered, if they were executed between the same parties at the same time and respecting the same subject-matter.<sup>2</sup> But such instruments are not to be considered for this purpose unless they are between the same parties, or, if they are between different parties, unless they relate to the same transaction and are in effect parts of one transaction.<sup>3</sup> Thus, if one advertises and sells land bounded on a stream, and on the same day, and as part of the same sale, sells the bed of the stream to another person, the deeds being executed the same day and containing the same recitals, the intention thus shown to separate the ownership of the bed of the stream from the ownership of the lot overcomes the presumption that the deed of the lot carries the title to the bed of the stream to its centre.<sup>4</sup>

**490.** When the starting-point is a monument on the bank of a river, and the line runs thence along the river or by it, or on it, the boundary is still by the thread of the stream, unless, by other terms used in the deed, it appears that it was intended to limit the boundary to the bank of the stream.<sup>5</sup> The same rule

<sup>1</sup> *Haight v. Hamor*, 83 Me. 453, 22 Atl. Rep. 369, per Whitehouse, J.; *Bradford v. Cressey*, 45 Me. 9; *Erskine v. Moulton*, 66 Me. 276; *Salisbury v. Andrews*, 19 Pick. 250; *Jackson v. Myers*, 3 Johns. 388, 3 Am. Dec. 504, per Kent, C. J.; *Buck v. Squiers*, 22 Vt. 484; *Dunham v. Williams*, 37 N. Y. 251; *Chicago v. Rumsey*, 87 Ill. 348; *Stolp v. Hoyt*, 44 Ill. 219; *Rockwell v. Baldwin*, 53 Ill. 19; *Mott v. Mott*, 68 N. Y. 246.

<sup>2</sup> *Haight v. Hamor*, 83 Me. 453, 22 Atl. Rep. 369, per Waterhouse, J.; *Cloyes v. Sweetser*, 4 Cush. 403; *King v. King*, 7 Mass. 496.

<sup>3</sup> *Cornell v. Todd*, 2 Denio, 130; *Putnam v. Stewart*, 97 N. Y. 411; *Rexford v. Marquis*, 7 Lans. 249.

<sup>4</sup> *Denver v. Pearce* (Colo.), 22 Pac. Rep. 774.

<sup>5</sup> *St. Clair Co. v. Lovington*, 23 Wall. 46; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Whitehurst v. McDonald*, 52 Fed. Rep. 633, 3 C. C. A. 214, 8 U. S. App. 164, affirming 47 Fed. Rep. 757; *Gouverneur v. Nat. Ice Co.* 134 N. Y. 355, 31 N. E. Rep. 865, reversing 11 N. Y. Supp. 87; *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637; *People v. Jones*, 112 N. Y. 597, 20 N. E. Rep. 577;

applies when a boundary line runs to a terminus on the bank of a river, and thence by or along the river to another terminus. "It is very difficult," says Cowan, J., "for the human mind to resist that the parties never mean to leave a narrow strip between the land and the river merely because some stake or tree, or even all the stakes and trees of the line, stand at a slight distance from the river. The expression of an intent to run the line along the stream reaches a distinct natural monument which overcomes the others. They are rather intended to indicate or point down to the *termini* of the water line."<sup>1</sup> Thus, where the starting-point was a hickory-tree standing on the bank of the Ohio River, thence after several courses to a corner ironwood-tree on the bank of the river, and thence by the river to the starting-point, the boundary was held to be by the river.<sup>2</sup> A boundary line running from a post on the north bank of a creek, "thence down the same and along the several meanders thereof to the place of beginning," which was also on the bank, includes the bed of the stream to the centre.<sup>3</sup> A survey running to a point on a river, and "thence down said river, and binding thereon," to another point, includes a sand-bar on the same side of the river, between the two points.<sup>4</sup>

While, as already noticed, in many States a boundary starting

*Newton v. Eddy*, 23 Vt. 319; *Robinson v. White*, 42 Me. 209; *Low v. Tibbetts*, 72 Me. 92, 39 Am. Rep. 303; *Lowell v. Robinson*, 16 Me. 357, 33 Am. Dec. 671; *Lunt v. Holland*, 14 Mass. 149; *Cold Spring Iron Works v. Tolland*, 9 Cush. 492; *Woodman v. Spencer*, 54 N. H. 507; *Rix v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472; *Kent v. Taylor*, 64 N. H. 489, 13 Atl. Rep. 419; *Wood v. Appal*, 63 Pa. St. 210; *Grant v. White*, 63 Pa. St. 271; *Coovert v. O'Connor*, 8 Watts, 470; *Klingensmith v. Ground*, 5 Watts, 458; *McCulloch v. Aten*, 2 Ohio, 307; *Turner v. Parker*, 14 Oreg. 340; *Hayes v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 33; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. Rep. 42; *Camden v. Creel*, 4 W. Va. 365. "It may be considered," say the Supreme Court, "a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at,

in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing the intention of the parties was otherwise." *St. Clair County v. Livingston*, 23 Wall. 46, 64; *Railroad Co. v. Schurmeir*, 7 Wall. 272.

<sup>1</sup> *Starr v. Child*, 20 Wend. 149, 156, 5 Denio, 599; *Child v. Starr*, 4 Hill, 369; *Halsey v. McCormick*, 13 N. Y. 296; *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *Mott v. Mott*, 68 N. Y. 246; *Gouverneur v. Nat. Ice Co.* 134 N. Y. 355, 31 N. E. Rep. 865.

<sup>2</sup> *Wood v. Appal*, 63 Pa. St. 210.

<sup>3</sup> *Seneca Nation v. Knight*, 23 N. Y. 498.

<sup>4</sup> *Asher Lumber Co. v. Lunsford (Ky.)*, 30 S. W. Rep. 968.



at a monument on the bank of a stream, and thence running along the stream, includes the stream to the middle of the channel, yet there are decisions to the effect that in such case the stream is wholly or partly excluded.<sup>1</sup>

491. Even if the monument is some distance from the river, the boundary thence by the river will be by the thread of the stream, if there is nothing further in the deed to show an intention to limit the boundary to the bank.<sup>2</sup> A corner tree or other monument is not always to be had near a river, and therefore one may be taken at some distance from it; but if the course is by the river, this is regarded as the boundary.<sup>3</sup> The stream is a natural boundary, and controls a call for a monument on the bank; and it is not to be presumed that the grantor retains a strip of land between the line indicated by the monuments and the line of low water.<sup>4</sup> But this presumption does not apply when the boundary is a mill-race owned and retained by the grantor; for in such case there is an obvious reason why the grantor should wish to retain such narrow strip between the top of the bank of the mill-race and the water-edge of the mill-race at low-water mark.<sup>5</sup>

Where land is described as lying on a river named, the meander line of the river as surveyed does not constitute the boundary of the land, but the grantee is a riparian owner, and has title to the land lying between such meander line and the river, or to the thread of the river in case the boundary line is governed by the common-law rule.<sup>6</sup>

<sup>1</sup> *Dunlap v. Stetson*, 4 Mason, 349; *Bradford v. Cressey*, 45 Me. 9; *Lamb v. Ricketts*, 11 Ohio, 311; *Murphy v. Copeland*, 51 Iowa, 515, 1 N. W. Rep. 691; *Holbert v. Edens*, 5 Lea, 204, 40 Am. Rep. 26; *Babcock v. Utter*, 1 Abb. App. Dec. 27; *Fleming v. Kenney*, 4 J. J. Marsh, 155.

<sup>2</sup> *Grant v. White*, 63 Pa. St. 271, where the corner tree was fourteen perches from the river; *Cansler v. Henderson*, 64 N. C. 469.

<sup>3</sup> *Klingensmith v. Ground*, 5 Watts, 458.

<sup>4</sup> *Carter v. Railway Co.* 26 W. Va. 644; *Grant v. White*, 63 Pa. St. 271.

<sup>5</sup> *Carter v. Railway Co.* 26 W. Va. 644; *Martin v. Nance*, 3 Head, 649.

<sup>6</sup> *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 16 Fed. Rep. 823; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. Rep. 235; *Kraut v. Crawford*, 18 Iowa, 549, 87 Am. Dec. 414; *Houck v. Yates*, 82 Ill. 179; *Sphung v. Moore*, 120 Ind. 352, 22 N. E. Rep. 319; *State v. Portsmouth Sav. Bank*, 106 Ind. 435; *Edwards v. Ogle*, 76 Ind. 302; *Ridgway v. Ludlow*, 58 Ind. 248; *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655; *Minto v. Delaney*, 7 Oreg. 337; *Galveston Co. v. Tankersley*, 39 Tex. 651; *Hills v. Homton*, 4 Sawyer, 195; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103; *People v. Henderson*, 40 Cal. 29; *Menasha Wooden Ware Co. v.*

492. In government grants meander lines are not boundaries, but the watercourse is itself the boundary.<sup>1</sup> "Meander lines are run, in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the watercourse, and not the meander line as actually run on the land, is the boundary."<sup>2</sup>

In ascertaining the measurement from one point to another on navigable water, the measurement is by its meanders and not in a direct line.<sup>3</sup> But in determining the division line between adjoining owners on navigable water the measurement is by the

Lawson, 70 Wis. 600, 36 N. W. Rep. 412.

<sup>1</sup> *Hardin v. Jordan*, 140 U. S. 371, 381, 11 Sup. Ct. Rep. 808, 838; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840; *Jefferis v. Land Co.* 134 U. S. 178, 10 Sup. Ct. Rep. 518, affirming 40 Fed. Rep. 386; *Railroad Co. v. Schurmeir*, 7 Wall. 272, per Clifford, J.; *Banks v. Ogden*, 2 Wall. 67; *Forsyth v. Smale*, 7 Biss. 201; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. Rep. 203. **Illinois**: *Fuller v. Dauphin*, 124 Ill. 542, 16 N. E. Rep. 917. **Indiana**: *Sphung v. Moore*, 120 Ind. 352, 22 N. E. Rep. 319; *Ridgway v. Ludlow*, 58 Ind. 248; *Stoner v. Rice*, 121 Ind. 51, 22 N. E. Rep. 968. **Iowa**: *Kraut v. Crawford*, 18 Iowa, 549, 87 Am. Dec. 414. **Michigan**: *Clute v. Fisher*, 65 Mich. 48, 31 N. W. Rep. 614; *Père Marquette Boom Co. v. Adams*, 44 Mich. 403, 6 N. W. Rep. 857; *Rice v. Ruddiman*, 10 Mich. 125; *Palmer v. Dodd*, 64 Mich. 474, 31 N. W. Rep. 209. **Minnesota**: *Schurmeir v. Railroad Co.* 10 Minn. 82, 88 Am. Dec. 59; *St. Paul, &c. R. Co. v. First Division, &c. R. Co.* 26 Minn. 31, 1 N. W. Rep. 580, 49 N. W. Rep. 303; *Everson v. Waseca*,

44 Minn. 247, 46 N. W. Rep. 405; *Lamprey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139. **Oregon**: *Weiss v. Oregon Iron Co.* 13 Oreg. 496, 11 Pac. Rep. 255; *Minto v. Delaney*, 7 Oreg. 337; *Turner v. Parker*, 14 Oreg. 340, 12 Pac. Rep. 495. **Utah**: *Knudsen v. Omanson (Utah)*, 37 Pac. Rep. 250. **Wisconsin**: *Lally v. Rossmann*, 82 Wis. 147, 51 N. W. Rep. 1132; *Whitney v. Lumber Co.* 78 Wis. 240, 249, 47 N. W. Rep. 425; *Northern Pine Land Co. v. Bigelow (Wis.)*, 54 N. W. Rep. 496; *Boorman v. Sunnuchs*, 42 Wis. 233; *Menasha Ware Co. v. Lawson*, 70 Wis. 600, 36 N. W. Rep. 412.

See, also, decision of Secretary of Interior in *Hemphill's Case*, in February, 1888, 6 Dec. Dep. Int. 555.

Otherwise in **Nebraska**: *Harrison v. Stipes*, 34 Neb. 431, 51 N. W. Rep. 976; *Lammers v. Nissen*, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 725, 28 N. W. Rep. 303.

<sup>2</sup> *Railroad Co. v. Schurmeir*, 7 Wall. 272, 286, per Clifford, J.

<sup>3</sup> *Rayburn v. Winant*, 16 Oreg. 318, 18 Pac. Rep. 588; *People v. Henderson*, 40 Cal. 32.

general trend of the water line.<sup>1</sup> Measurement in a straight line is sometimes adopted in the case of streams not navigable.<sup>2</sup>

493. The fact that the quantity of land called for in a deed is satisfied without including the bed of a stream which constitutes the boundary does not limit the title to the bank of the stream.<sup>3</sup> In the purchase of land bounded upon a river at a stipulated price per acre, it would seem that the purchaser would be required to pay for land to the line of ordinary low water only, though his title might extend to the thread of the stream.<sup>4</sup>

On the other hand, if the quantity of land and measurements require the inclusion of the shore, or land covered by the water between high and low water mark, this affords a reason for extending a boundary to meet this requirement. Thus, in a deed of land on Long Island Sound, the first course, starting from a point accurately fixed, ran a certain distance to a point on the Sound, thence along the shore to the intersection of the centre line of a certain street, and thence by said street a certain distance to the point of beginning. It appeared by a survey that the first and last courses, if run in obedience to the distance given, would extend to low-water mark, and that, to give the quantity the deed purported to convey, the land to low-water mark must be included. It was accordingly held that the boundary line was along the low-water mark.<sup>5</sup>

494. A boundary by a ditch or canal ordinarily extends the grant to the centre line of the ditch, if the grantor's title extends so far and not farther.<sup>6</sup> If the ditch is wholly upon the grantor's land, his deed bounding his land upon the ditch would carry the title to the whole of the ditch, because it would not be presumed that he would retain a strip of land occupied by half of the ditch,

<sup>1</sup> Northern Pine Land Co. v. Bigelow (Wis.), 54 N. W. Rep. 496.

<sup>2</sup> Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; People v. Henderson, 40 Cal. 29, per Temple, J.

<sup>3</sup> Dwyer v. Rich, Ir. R. 4 C. L. 424; Kent v. Taylor, 64 N. H. 489, 13 Atl. Rep. 419; Gouverneur v. Nat. Ice. Co. 134 N. Y. 355, 368, 31 N. E. Rep. 865. In the last case Bradley, J., said: "It is a matter of common knowledge in respect to lands bordering on streams and other bodies of water, that it is usual in sur-

veys, when made, to so describe the uplands as to compute the number of acres they contain."

<sup>4</sup> Holbert v. Edens, 5 Lea, 204, 40 Am. Rep. 26.

<sup>5</sup> Onkes v. De Lancey, 133 N. Y. 227, 14 N. Y. Supp. 294.

<sup>6</sup> Goodyear v. Shanahan, 43 Conn. 204; Warner v. Southworth, 6 Conn. 471; Agawam Canal Co. v. Edwards, 36 Conn. 476; Bishop v. Seeley, 18 Conn. 389; Candler v. Henderson, 64 N. C. 469; Dunklee v. Wilton R. Co. 24 N. H. 489.

which would be useless without the land adjoining. But this rule does not apply in case of a boundary upon an artificial watercourse, like a mill-race, flume, or ditch, in which the grantor still has an interest as owner of a mill, or of other land for the beneficial use of which such watercourse is necessary, or in case the flume or ditch is owned by another.<sup>1</sup>

495. A boundary by an artificial pond, formed by erecting a dam across a stream, passes the land to the thread of the stream.<sup>2</sup> It seems not to be material how long a time the pond has existed; for in one case the rule was applied to a mill-pond which had been in existence more than two hundred years.<sup>3</sup> A boundary line given as commencing at "a stake near the high-water mark" of a pond, thence running "along the high-water mark," is fixed at the high-water mark, and that mark is a permanent one, and does not follow the changes in the high-water mark of the pond.<sup>4</sup> Parol evidence is admissible to show that it was intended to limit the grant to the margin of the water as it overflowed the land in the spring.<sup>5</sup>

496. The common-law rule is that a deed of land bordering on a small lake not navigable is presumed to convey title to the centre of the lake, unless it appears that there was an intention otherwise; for the riparian owner has title to the land under such lake or pond extending to the centre.<sup>6</sup> The rule

<sup>1</sup> *Carter v. Railway Co.* 26 W. Va. 644; 18; *Lynch v. Allen*, 4 Dev. & Bat. 62, 92, 32 Am. Dec. 671.  
*Hoff v. Tobey*, 66 Barb. 347; *Morgan v. Bass*, 14 Fed. Rep. 454.

<sup>2</sup> *Mill River Woolen Manuf. Co. v. Smith*, 34 Conn. 462; *Phinney v. Watts*, 9 Gray, 269, 69 Am. Dec. 288; *Paine v. Woods*, 108 Mass. 160; *West Roxbury v. Stoddard*, 7 Allen, 158; *Mansur v. Blake*, 62 Me. 38; *Lowell v. Robinson*, 16 Me. 357, 33 Am. Dec. 671; *Robinson v. White*, 42 Me. 209; *State v. Gilmanton*, 9 N. H. 461; *Union Ry. & T. Co. v. Skinner*, 9 Mo. App. 189; *Wheeler v. Spinola*, 54 N. Y. 377; *Primm v. Raboteau*, 56 Mo. 407; *Holden v. Chandler*, 61 Vt. 291, 18 Atl. Rep. 310; *Church v. Stiles*, 59 Vt. 642, 10 Atl. Rep. 674.

<sup>3</sup> *Mill River Woolen Manuf. Co. v. Smith*, 34 Conn. 462.

<sup>4</sup> *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270; *Jones v. Parker*, 99 N. C. 18; *Lynch v. Allen*, 4 Dev. & Bat. 62, 92, 32 Am. Dec. 671.

<sup>5</sup> *Lowell v. Robinson*, 16 Me. 357, 33 Am. Dec. 671.

<sup>6</sup> *Bristow v. Cormican*, 3 App. Cas. 641. This case related to riparian rights in Lough Neagh, a lake in the north of Ireland, about fifteen miles in length and ten miles in breadth, the longest inland lake in the United Kingdom, and one of the largest in Europe. It was held that the crown had no property in the land under the lake, but that it belonged to the adjoining owners of the land on the borders of the lake. *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838; *Forsythe v. Smale*, 7 Biss. 201. **Indiana:** *Ridgway v. Ludlow*, 58 Ind. 248, holding also that a prescriptive right acquired by adverse possession to land adjacent to such lake extended to the middle of it. *Stoner*

is otherwise in Massachusetts, because of the colonial law or ordinance adopted in 1641, and amended in 1647, declaring great ponds, which were defined as those containing more than ten acres, to be public property, and since that time such ponds have not been subject to private ownership.<sup>1</sup> In New York, and other States having no similar statute, the land under small lakes and ponds is the subject of private ownership, and a boundary thereon, in a conveyance by the owner of the adjoining lands, passes his title to the centre line of such lake or pond.

497. The general rule of private ownership of lakes applies to natural lakes of considerable size,<sup>2</sup> such as a lake about seven miles long and half a mile wide,<sup>3</sup> or a lake three miles in length and one mile in width,<sup>4</sup> or a lake four or five miles long and eight hundred feet wide.<sup>5</sup>

In case government surveys have been extended over small lakes, just as though the whole was dry land, and titles have been conveyed with reference to such surveys, the boundaries of lands under such surveys may be confined to the terms of the patents and deeds.<sup>6</sup>

*v. Rice*, 121 Ind. 51, 22 N. E. Rep. 968. **Michigan**: *Rice v. Ruddiman*, 10 Mich. 125; *Clute v. Fisher*, 65 Mich. 48, 31 N. W. Rep. 614. **Missouri**: *Kirkpatrick v. Yates Ice Co.* 45 Mo. App. 335. **New Jersey**: *Cobb v. Davenport*, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718; *Kanouse v. Stockbower*, 48 N. J. Eq. 42, 21 Atl. Rep. 197; *Fowler v. Vreeland*, 44 N. J. Eq. 268, 14 Atl. Rep. 116. **New York**: *Gouverneur v. National Ice Co.* 134 N. Y. 355, 31 N. E. Rep. 865, reversing 11 N. Y. Supp. 87; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Ledyard v. Ten Eyck*, 36 Barb. 102. **Ohio**: *Lembeck v. Nye*, 47 Ohio St. 326, 24 N. E. Rep. 686.

<sup>1</sup> *West Roxbury v. Stoddard*, 7 Allen, 158; *Hittinger v. Eames*, 121 Mass. 539; *Watuppa, &c. Co. v. Fall River*, 154 Mass. 305, 28 N. E. Rep. 257. "When the colony of Massachusetts, two hundred and fifty years ago, reserved to public use her 'great ponds,' probably only fishing and fowling were in mind. But, as is said in one case (*West Roxbury v. Stoddard*, 7 Allen, 158), 'with the growth of the com-

munity and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all as they arise.'" *Lamprey v. State*, 52 Minn. 181, 200, per Mitchell, J.

<sup>2</sup> *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. Rep. 686; *Hogg v. Beerman*, 41 Ohio St. 81.

<sup>3</sup> *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393. In *Ledyard v. Ten Eyck*, 36 Barb. 102, it was held that land conveyed by deed bounding it on Cazenovia Lake, which was five miles long and three fourths of a mile in width, extended to its centre. But the conclusion reached in that case may have been supported upon another ground.

<sup>4</sup> *Cobb v. Davenport*, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718.

<sup>5</sup> *Kirkpatrick v. Yates Ice Co.* 45 Mo. App. 335.

<sup>6</sup> *Kirkpatrick v. Yates Ice Co.* 45 Mo. App. 335.

498. The presumption of a boundary by the centre of a pond or lake may be excluded by any description which indicates an intention to limit the grant by the shore or edge of the lake. Thus, if the boundary is described to be "at low-water mark,"<sup>1</sup> or "meandering along the water's edge,"<sup>2</sup> by the "margin" of the lake,<sup>3</sup> "on the edge of the pond,"<sup>4</sup> a boundary by the centre of the lake is excluded.

The land covered by a lake or mill-pond which is the subject of private ownership may be conveyed separate and apart from the land surrounding the lake or pond; as when such owner conveys a mill and mill privilege "embracing as far as high-water mark."<sup>5</sup>

499. The rule of ownership *ad flum aquæ* is not applicable to the great fresh-water lakes which form the boundary between the United States and Canada, or to lakes which form the boundary between States, such as Lake Champlain, for example. These are regarded as inland seas, and the title of their beds is in the adjoining States, and not in the individual owners of the adjoining land. The matter of title to the beds of such lakes is wholly unprovided for by the common law of England.<sup>6</sup> In this country the rule has been adopted that such lakes are not private property but public. There may be a reason for this exception to the rule, not depending upon the size of the lake as regards those lakes which form the natural boundaries between this country and a foreign nation, or those that form the boundaries between States, but the reason for the exception may also be founded upon the size and navigable character of such lakes.<sup>7</sup>

500. The State is the owner of the fee of all lands under the navigable waters of the great lakes, but in trust for the

<sup>1</sup> *Allen v. Weber*, 80 Wis. 531, 50 N. W. Rep. 514.

<sup>2</sup> *Brophy v. Richeson* (Ind.), 36 N. E. Rep. 424.

<sup>3</sup> *Lembeck v. Andrews*, 47 Ohio St. 336; *Fowler v. Vreeland*, 44 N. J. Eq. 268, 14 Atl. Rep. 116.

<sup>4</sup> *Holden v. Chandler*, 61 Vt. 291, 18 Atl. Rep. 310; *Eddy v. St. Mars*, 53 Vt. 462.

<sup>5</sup> *Jones v. Parker*, 99 N. C. 18, 5 S. E. Rep. 383.

<sup>6</sup> *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838; *Canal Commissioners v. People*, 5 Wend. 423, 447; *Canal Appraisers v. People*, 17 Wend. 571;

*Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *People v. Jones*, 112 N. Y. 597, 606, 20 N. E. Rep. 577.

<sup>7</sup> *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 484. This case had relation to rights in Lake Champlain, a large navigable lake about one hundred and thirty miles in length, and varying from about fifteen miles to less in width. *State v. Milk*, 11 Biss. 197; *Wheeler v. Spinola*, 54 N. Y. 377; *Canal Commissioners v. People*, 5 Wend. 423; *Fletcher v. Phelps*, 28 Vt. 257; *Hathorn v. Stinson*, 10 Me. 224, 238; *Dillingham v. Smith*, 30 Me. 370.

use of the public.<sup>1</sup> "The title to such lands being in the State, 'they are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce, . . . state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and subjecting the lands to the necessities and uses of commerce.'"<sup>2</sup> To what extent a State may exercise its prerogative over the land covered by the waters of these lakes depends upon the law of each State, just as it does in the case of the great navigable rivers. The States may, if they so determine, resign to the riparian proprietor rights which properly belong to them in their sovereign capacity.<sup>3</sup>

Where land bordering upon a large lake, such as the Winnepesaukee or any navigable lake, is conveyed, the right of the purchaser to erect a wharf or building in the lake below low-water mark, as against everybody but the State, passes as an appurtenance to the land.<sup>4</sup>

**501. The boundary line upon a large natural lake or great pond is the low-water line at which the water usually stands when free from disturbing causes.<sup>5</sup> If the water be raised to an artificial height in the winter, but in summer is allowed to remain at its natural level, a boundary by the lake or pond conveys the land to the low-water mark of the lake or pond in its natural**

<sup>1</sup> *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. Rep. 110; *McLennan v. Prentice*, 85 Wis. 427, 35 N. W. Rep. 764; *Diedrich v. Northwest Ry. Co.* 42 Wis. 248; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 235; *Winnepesaukee Asso. v. Gordon (N. H.)*, 29 Atl. Rep. 412; *Concord Manuf. Co. v. Robertson*, 66 N. H. 1, 18, 25 Atl. Rep. 718.

<sup>2</sup> *Hardin v. Jordan*, 140 U. S. 371, 382, 11 Sup. Ct. Rep. 808, 838.

<sup>3</sup> *Barney v. Keokuk*, 94 U. S. 324; *Hardin v. Jordan*, 140 U. S. 371, 382, 11 Sup. Ct. Rep. 808, 838; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. Rep. 110.

<sup>4</sup> *Winnepesaukee Asso. v. Gordon (N. H.)*, 29 Atl. Rep. 412.

<sup>5</sup> *Paine v. Woods*, 108 Mass. 160; *West Roxbury v. Stoddard*, 7 Allen, 158;

*Waterman v. Johnson*, 13 Pick. 261; *Seaman v. Smith*, 24 Ill. 521; *Indiana v. Milk*, 11 Biss. 197, 11 Fed. Rep. 389; *Trustees v. Schroll*, 120 Ill. 509, 2 N. E. Rep. 243, 60 Am. Rep. 575. The Supreme Court of the United States, however, in *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, review this case, and discard it as not correctly declaring the common law of the State; *Wheeler v. Spinola*, 54 N. Y. 377; *Canal Commissioners v. The People*, 5 Wend. 423, 447; *Champlain & St. L. R. R. Co. v. Valentine*, 19 Barb. N. Y. 484; *Lincoln v. Davis*, 53 Mich. 375, 19 N. W. Rep. 103, 51 Am. Rep. 116; *Rice v. Ruddiman*, 10 Mich. 125; *Sloan v. Biemiller*, 34 Ohio St. 492; *Wood v. Kelley*, 30 Me. 47; *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501; *Stevens v. King*, 76 Me. 197, 49

state, and it is immaterial that the conveyance was executed in the winter, when the water was high.<sup>1</sup> In case a natural pond has been permanently enlarged and raised by means of a dam at its outlet, a boundary upon the pond carries the title to the low-water mark of the pond in its enlarged state.<sup>2</sup> Of course the general rule, that the boundary by a natural lake is a boundary by low-water mark, gives way to any clearly expressed intent to the contrary.<sup>3</sup>

The grant of an island in a swamp or natural lake carries the title to low-water mark; but if the swamp or lake is afterwards drained by artificial means, the grantee's title does not extend to and include the land laid bare by such drainage, but remains at the line of low water, as it was when the grant was made, and evidence to determine where such line was is admissible.<sup>4</sup> If there is a stream running through the swamp, a boundary by the swamp is by the middle of the stream.<sup>5</sup> A boundary by a slough or arm of a navigable river is by the middle of the slough.<sup>6</sup>

502. A boundary by the shore of a lake conveys all the riparian rights of the grantor in the lake, in front of the land conveyed, and, as against the grantor, any land made by filling in the lake at the shore.<sup>7</sup> It is never presumed that the grantor reserves to himself any proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance; and the mere fact that the boundary of the lot conveyed is indicated by a line on the plat will not limit the grant to the lines on the plat, or operate to reserve to the grantor proprietary rights in front of the lot.<sup>8</sup>

Am. Rep. 609; *Delaplaine v. Chicago & N. W. Ry. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Boorman v. Sunnucks*, 42 Wis. 233; *State v. Gilmanton*, 9 N. H. 461; *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 316; *Austin v. Rutland R. Co.* 45 Vt. 215; *Kanouse v. Stockbower*, 48 N. J. Eq. 42, 21 Atl. Rep. 197; *Wayzata v. Great Northern Ry. Co.* 50 Minn. 438, 52 N. W. Rep. 913; *Castle v. Elder* (Minn.), 59 N. W. Rep. 197.

<sup>1</sup> *Paine v. Woods*, 108 Mass. 160; *West Roxbury v. Stoddard*, 7 Allen, 158; *Waterman v. Johnson*, 13 Pick. 261; *Wood v. Kelley*, 30 Me. 47, practically overruling *Bradley v. Rice*, 13 Me. 198, 29 Am.

Dec. 501; *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167.

<sup>2</sup> *Wood v. Kelley*, 30 Me. 47.

<sup>3</sup> *People v. Jones*, 112 N. Y. 597, 20 N. E. Rep. 577; *Gouverneur v. National Ice Co.* 57 Hun, 474, 11 N. Y. Supp. 87.

<sup>4</sup> *Lewis v. Roper Lumber Co.* 109 N. C. 19, 18 S. E. Rep. 52, 13 S. E. Rep. 701.

<sup>5</sup> *Felder v. Bonnett*, 2 McMull (S. C.), 44, 37 Am. Dec. 545.

<sup>6</sup> *Fuller v. Dauphin*, 124 Ill. 542, 16 N. E. Rep. 917.

<sup>7</sup> *Castle v. Elder* (Minn.), 59 N. W. Rep. 197.

<sup>8</sup> *Gilbert v. Emerson*, 55 Minn. 254, 56



A street, one side of which is by a navigable lake or river, extends to low-water mark, and the dedication of it to public use is held to have been intended to enable the public to get to the water for the better enjoyment of the public right of navigation.<sup>1</sup> A purchaser of a lot fronting on such street acquires the fee, subject to the public easement, to the entire street and shore to low-water mark, including all riparian rights.<sup>2</sup>

N. W. Rep. 818, citing *Watson v. Peters*, 26 Mich. 508.

<sup>1</sup> *Wayzata v. Great Northern Ry. Co.* 50 Minn. 438, 52 N. W. Rep. 913, per Gillfillan, C. J. The court say: "We know of no rule for determining the extent of a grant or dedication of land to public use, where a navigable lake or river is adopted as one of the boundaries, other than that applied in the case of a private grant.

Where, in a private grant, the land is bounded only by navigable water, the grantee takes to the low-water mark." See, however, *Banks v. Ogden*, 2 Wall. 57; *Lotz v. Reading Iron Co.* 10 Pa. Co. Ct. 497.

<sup>2</sup> *Wait v. May*, 48 Minn. 453, 51 N. W. Rep. 471. See, however, *Codman v. Winslow*, 10 Mass. 146.

## CHAPTER XIX.

### EXCEPTIONS AND RESERVATIONS.

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| I. How distinguished, §§ 503-515.                          | III. Of particular exceptions and reservations, 536-547.                   |
| II. General requisites and rules of construction, 516-535. | IV. Whether a reservation is personal or appurtenant to the land, 548-560. |

#### I. *How Distinguished.*

**503. In general.** — An exception in a deed withholds from its operation some part or parcel of the thing, which, but for the exception, would pass by the general description to the grantee. A reservation, on the other hand, is the creation of some new right issuing out of the thing granted, and which did not exist before as an independent right, in behalf of the grantor and not of a stranger.<sup>1</sup> It is often difficult to distinguish between an

<sup>1</sup> Lord Coke (Coke's Litt. 47 a) says: "Note a diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*), for which *exceptis, salvo, præter*, and the like, be apt words, and a reservation, which is always of a thing not *in esse*, but newly created, or reserved out of the land or tenement demised." Sheppard (Touch. p. 80) says: "A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before." And again: "This doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time: but this is of a thing newly created, or reserved out of a thing demised, that was not *in esse* before; so that this doth always reserve that which was not before, or abridge the tenure, *i. e.* 'tenor,' of that which was before." And again: "It must be of some other thing issuing or coming out of the thing granted, and not a part

of the thing itself, nor of something issuing out of another thing."

See, also, *Douglas v. Lock*, 4 Nev. & M. 807, 824; *Cardigan v. Armitage*, 2 B. & C. 197; *Brown v. Cranberry Iron, &c.* Co. 59 Fed. Rep. 434, 440. *Connecticut*: *Marshall v. Trumbull*, 28 Conn. 183, 78 Am. Dec. 667. *Georgia*: *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 441. *Illinois*: *Gould v. Howe*, 131 Ill. 490, 496, 23 N. E. Rep. 602. *Kentucky*: *Brown v. Anderson*, 88 Ky. 577, 11 S. W. Rep. 607. *Maine*: *Winthrop v. Fairbanks*, 41 Me. 307; *State v. Wilson*, 42 Me. 9; *Garland v. Hodsdon*, 46 Me. 511; *Engel v. Ayer*, 85 Me. 448, 27 Atl. Rep. 352. *Maryland*: *Herbert v. Pue*, 72 Md. 307, 311, 20 Atl. Rep. 182; *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. Rep. 669. *Massachusetts*: *Wood v. Boyd*, 145 Mass. 176, 13 N. E. Rep. 476; *Murphy v. Lee*, 144 Mass. 371, 11 N. E. Rep. 550; *Ashcroft v. Eastern Railroad*, 126 Mass. 196, 30 Am. Rep. 672; *Perkins v. Stockwell*, 131 Mass. 529;

exception and a reservation in a deed, and the words "reserving" and "excepting" are not conclusive in determining which is intended. The character and effect of the provision itself, in which such words occur, must determine what is intended.<sup>1</sup> If the intent of the deed is to vest in the grantor some new right or interest which did not before exist in him, it is a reservation; but if it was the plain purpose of the parties not to reserve a new right which should vest in the grantor, but to recognize and except from the grant an existing right which would otherwise pass to the grantee, it is the purpose of the parties to create an exception, whatever may be the language used.<sup>2</sup>

*Stockwell v. Couillard*, 129 Mass. 231; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290. **Michigan**: *Martin v. Cook* (Mich.), 60 N. W. Rep. 679. **Minnesota**: *Elliot v. Small*, 35 Minn. 396, 29 N. W. Rep. 158, 59 Am. Rep. 329. **Mississippi**: *McAllister v. Honea* (Miss.), 14 So. Rep. 264. **New York**: *Craig v. Wells*, 11 N. Y. 315; *Ives v. Van Auken*, 34 Barb. 566; *Starr v. Child*, 5 Denio, 599; *Blackman v. Striker*, 142 N. Y. 555, 37 N. E. Rep. 484, 29 Abb. N. C. 467, 21 N. Y. Supp. 563; *Mitchell v. Thorne*, 134 N. Y. 536, 32 N. E. Rep. 10; *Langdon v. Mayor*, 6 Abb. N. C. 314. **North Carolina**: *Waugh v. Richardson*, 8 Ired. 470. **Pennsylvania**: *Whitaker v. Brown*, 46 Pa. St. 197. **Rhode Island**: *In re Young*, 11 R. I. 636. **Washington**: *Biles v. Tacoma, &c.* R. Co. 5 Wash. 509, 32 Pac. Rep. 211. **Wisconsin**: *Fischer v. Laack*, 76 Wis. 313, 45 N. W. Rep. 104; *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81.

<sup>1</sup> *Shep. Touch.* 80; *Bowman v. Walthen*, 2 McLean, 376, 392; *Ashcroft v. Eastern R. Co.* 126 Mass. 196, 30 Am. Rep. 672; *Stockwell v. Couillard*, 129 Mass. 231; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290, 321; *Perkins v. Stockwell*, 131 Mass. 529, 530; *Winthrop v. Fairbanks*, 41 Me. 307; *Bowen v. Conner*, 6 Cush. 132; *Gould v. Howe*, 131 Ill. 490, 23 N. E. Rep. 602.

<sup>2</sup> *Wood v. Boyd*, 145 Mass. 176, 13 N. E. Rep. 476; *Snoddy v. Bolen*, 122 Mo. 479, 25 S. W. Rep. 932.

This is illustrated in the case of *Gould*

*v. Howe*, 131 Ill. 490, 23 N. E. Rep. 602. A railroad company having platted a town, sold a parcel "reserving streets and alleys according to recorded plat of the town," and it was held the deed passed the fee in such streets when such fee was at the time held by the grantor subject to the easement of the public therein. *Scholfield, J.*, delivering judgment, said: "If here there had been no public easement in the streets and alleys, and the company had desired to retain for its servants and employees a private way across the land conveyed, it would have been a reservation; it would have been the creation of a new right, issuing out of the thing granted, in behalf of the grantor. But the streets and alleys were already in existence. The municipality had an easement in them for the public. The land occupied by them was included by the terms of the deed in the general description of the property conveyed, and hence, but for the provision withholding them from its operation, they would have been included in the grant. *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290. The language of the deed could only be held to withhold the fee of the streets and alleys from its operation upon the hypothesis that, 'according to recorded plat of town of Wenona,' the fee of the streets and alleys is vested in the municipality, for that is the measure of what is withheld from the operation of the deed; and therefore, since 'according to recorded plat of town of Wenona' an easement only in the soil of the streets and

An exception operates to retain in the grantor some portion of his former estate, which is thus taken out of or excluded from the grant. Whatever is thus excepted remains in him as of his former title, because it is not granted. An exception retains the title in the grantor, though the purpose for which the exception is made be a future one. Thus, in a conveyance by a city, an exception of so much of the land as is required for streets is an exception *in præsentî* of so much of the land as the city should afterwards require for such use.<sup>1</sup> An exception is always of some part of the estate not granted at all. A reservation is always of something taken back out of that which is clearly granted. Reservations of right of way, of water, of light, or of any other right or profit to arise out of the thing granted, are instances of reservations properly so called, whatever name the parties may have given to such reservations.<sup>2</sup>

Any exception or reservation out of the conveyance is properly mentioned immediately after the description of the parcels.<sup>3</sup>

**504. A right of way reserved for the use of the grantor is usually a new thing, derived from the land conveyed.** The grantor before giving his deed had a right of way wherever he chose to exercise it; but when he has conveyed the land, reserving a right of way, this is a new thing separated from the grantee's interest in the land.<sup>4</sup> If, however, a particular way al-

leys is vested in the municipality for the use of the public, that only is withheld from the operation of the deed."

<sup>1</sup> *Wood v. Boyd*, 145 Mass. 176, 13 N. E. Rep. 476; *Ashcroft v. Railroad Co.* 126 Mass. 196, 30 Am. Rep. 672; *Cutler v. Tufts*, 3 Pick. 272, 277; *Coheco Manuf. Co. v. Whittier*, 10 N. H. 305, 310; *Mayor v. Law*, 6 N. Y. Supp. 628; *Fisher v. Cid Copper M. Co.* 97 N. C. 95, 4 S. E. Rep. 772; *Wagh v. Richardson*, 8 Ired. 470; *Brown v. Cranberry Iron Co.* 59 Fed. Rep. 434, 440.

<sup>2</sup> *State v. Wilson*, 42 Me. 9; *Gay v. Walker*, 36 Me. 54, 58 Am. Dec. 734; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608; *Jones v. De Lassus*, 84 Mo. 541.

"To a good exception these things must concur: 1, the exception must be by apt words; 2, it must be of part of the

thing granted, and not of some other thing; 3, it must be a part of the thing only, and not of all, the greater part, or the effect, of the thing granted; 4, it must be of such thing as is severable from the thing which is granted, and not of an inseparable incident; 5, it must be such a thing as he that doth accept may have and doth properly belong to him; 6, it must be of a particular thing out of a general, and not of a particular thing out of a particular thing, or of a part out of a certainty; 7, it must be certainly described and set down." *McAllister v. Honea*, 71 Miss. 256, 14 So. Rep. 264, citing *Shep. Touch.* 77.

<sup>3</sup> If placed after the covenants, an exception might be regarded as excepting from the covenants only. *Knapp v. Wolverton*, 47 Mich. 292, 11 N. W. Rep. 164.

<sup>4</sup> *Moffitt v. Lytle*, 165 Pa. St. 173, 30 Atl.

ready existing is reserved, the reservation may be construed as an exception, if from the deed itself, and the situation of the parties, such appears to have been the intention of the parties.<sup>1</sup> Thus, where the grantor reserved to the public the use of a way across the granted parcel, and it appeared that the way referred to was a way which had long been laid out and used by the public, it was regarded as the manifest intention of the parties to withhold from the operation of the conveyance the use and enjoyment by the public of such existing way, and to relieve the grantor from any liability under his covenants of warranty.<sup>2</sup>

**505. A reservation sometimes has the force of an exception.** It is so construed when it falls within the definition of an exception, and it appears to have been the intention of the parties that it should so operate.<sup>3</sup> Thus where a deed in fee was made, the grantor "saving and reserving, nevertheless, for his own use, the coal" contained in said parcel, it was held that the saving clause operated as an exception of the coal, and that, therefore, the entire and perpetual property in it remained in the grantor. The words of reservation must be construed as an exception, because the subject of the reservation was not something newly created, but a thing corporate and *in esse* when the

Rep. 922; *Kister v. Reeser*, 98 Pa. St. 1. In the latter case Mr. Justice Trunkey, delivering the opinion, said: "Where land is granted, and the right of way reserved, that right becomes a new thing derived from the land; and although before the deed the grantor had the right of way over the land whenever he chose to exercise it, yet when he conveyed the land the reservation was the thing separated from the right of the grantee in the land. A reservation is the creation of a right or interest which had no prior existence as such in a thing or part of a thing granted. It is distinguished from an exception in that it is of a new right or interest. An exception is always of part of the thing granted; it is of the whole of the part excepted." Also *Carlson v. Duluth Short Line Ry. Co.* 38 Minn. 505, 37 N. E. Rep. 341.

<sup>1</sup> *Bridger v. Pierson*, 45 N. Y. 601; *Chappell v. New York, &c. R. Co.* 62 Conn. 195, 204, 24 Atl. Rep. 997; *State*

*v. Wilson*, 42 Me. 9; *Moulton v. Trafton*, 64 Me. 218, 223. See *Gould v. Howe*, 131 Ill. 490, 23 N. E. Rep. 602.

<sup>2</sup> *State v. Wilson*, 42 Me. 9.

<sup>3</sup> *Co. Litt.* 143; *Doe v. Lock*, 4 Nev. & M. 807; *Stockwell v. Couillard*, 129 Mass. 231; *Wood v. Boyd*, 145 Mass. 176, 13 N. E. Rep. 476; *Kimball v. Withington*, 141 Mass. 376, 6 N. E. Rep. 759; *Dennis v. Wilson*, 107 Mass. 591, 593; *Pettee v. Hawes*, 13 Pick. 323; *Bowen v. Conner*, 6 Cush. 132; *White v. New York & N. E. R. Co.* 156 Mass. 181, 30 N. E. Rep. 612; *Hurd v. Curtis*, 7 Met. 94; *Winthrop v. Fairbanks*, 41 Me. 307; *State v. Wilson*, 42 Me. 9; *Smith v. Ladd*, 41 Me. 314; *Herrick v. Marshall*, 66 Me. 435; *Green Bay & Miss. Canal Co. v. Hewitt*, 66 Wis. 461, 29 N. W. Rep. 237; *Case v. Haight*, 3 Wend. 632; *Snoddy v. Bolen*, 122 Mo. 479, 25 S. W. Rep. 932; *Brown v. Rickard*, 107 N. C. 639, 12 S. E. Rep. 570; *Watkins v. Tucker*, 84 Tex. 428, 19 S. W. Rep. 570.

grant was made. The reservation amounting to an exception, the grantor had the same dominion over the property that he would have had if he had made no deed of the land; and the limitation "for his own use" does not restrict his absolute proprietorship.<sup>1</sup> In a grant of land upon a river, a reservation of a right previously granted to another to maintain a dam is construed to be an exception, as this construction is necessary to carry out the manifest intention of the conveyance.<sup>2</sup> The language used must be considered with reference to the subject-matter and the circumstances of the particular case.<sup>3</sup> "Whether, in a given case, the language shall be construed to create an exception or reservation will depend upon the situation of the property and the surrounding circumstances, in the absence of a declaration in the deed by the parties of their intention as to the nature of a way."<sup>4</sup>

**506. A reservation of an existing right may properly be construed as an exception.**<sup>5</sup> A deed, after the description of the land by metes and bounds, contained this clause: "Reserving to the owner of the estate and others adjoining . . . a right of passageway over the within granted premises, as specified" in a former deed. This right of way had been created many years previously by the owner of the entire tract of which the premises in question then formed a part, who had also subsequently conveyed the passageway, which was a defined and existing one, to a grantee of a part of the tract. It was held that the clause in the deed was an exception and not a reservation.<sup>6</sup> In like manner, where the owner of land had conveyed a part of it, with a right to maintain a dam on the rest, and afterwards conveyed to a third person the whole parcel, "reserving" all the rights of the

<sup>1</sup> *Whitaker v. Brown*, 46 Pa. St. 197. This case is cited and approved in *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608, where it is said: "These terms ['exception' and 'reservation'] are often used in the same sense, the technical distinction being disregarded. Though apt words of reservation be used, they will be construed as an exception if such was the design of the parties."

<sup>2</sup> *Stockwell v. Couillard*, 129 Mass. 231.

<sup>3</sup> *Snoddy v. Bolen*, 122 Mo. 479, 25 S. W. Rep. 932.

<sup>4</sup> *White v. New York & N. E. R. Co.*

156 Mass. 181, 30 N. E. Rep. 612, per Morton, J., citing *Dennis v. Wilson*, 107 Mass. 591.

<sup>5</sup> *Murphy v. Lee*, 144 Mass. 371, 11 N. E. Rep. 550; *Engel v. Ayer*, 85 Me. 448, 27 Atl. Rep. 352; *Winthrop v. Fairbanks*, 41 Me. 307; *State v. Wilson*, 42 Me. 9; *Whitaker v. Brown*, 46 Pa. St. 197; *Bridger v. Pierson*, 45 N. Y. 601; *Painter v. Pasadena, &c. Co.* 91 Cal. 74, 27 Pac. Rep. 539; *Brown v. Anderson*, 88 Ky. 577, 11 S. W. Rep. 607.

<sup>6</sup> *Wood v. Boyd*, 145 Mass. 176, 13 N. E. Rep. 476.

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former grantee, it was held that the reservation was in effect an exception.<sup>1</sup>

A reservation or exception of all roads built over the premises is not an exception of the soil of the roads, but merely of the easement of the public in such roads.<sup>2</sup>

**507. A reservation of minerals and mining rights is usually construed as an exception, or even an actual re-grant of them; and though a reservation is to be construed most strongly against the grantor, still he will be regarded as retaining all that it was the clear intention of the parties to reserve or except from the conveyance.<sup>3</sup> The ground of this construction is that the minerals are *in esse* at the time the grant is made, and not something newly created, such as a rent, or other interest strictly incorporeal.<sup>4</sup> A reservation of an exclusive right of mining coal or ores from the granted land clearly operates as an exception of the mines from the grant.<sup>5</sup> Minerals, coals, and ores excepted from a grant remain in the grantor as before the grant. They are a distinct and separate property, which may be conveyed separately from the surface.<sup>6</sup>**

**508. A reservation cannot be construed as an exception when the intention was to confer upon the grantor a new right not previously vested in him, and which, therefore, could not be the subject of an exception. Thus a reservation of a right to maintain an aqueduct through a culvert of a railroad, with a provision that the grantee is to build the culvert and keep it in repair, is an essential part of the grant, and confers upon the grantor a new right not previously vested in him. It cannot, therefore, be the subject of an exception.<sup>7</sup> A reservation of the right of mining a certain quantity of ore annually is not a reservation of any title to the land, or in the ore before it is mined and separated from the land, and does not of itself restrict the grantee from mining at the same time, even to the extent of exhausting**

<sup>1</sup> Stockwell v. Couillard, 129 Mass. 231.

<sup>2</sup> Capron v. Kingman, 64 N. H. 571, 14 Atl. Rep. 868.

<sup>3</sup> Cardigan v. Armitage, 2 B. & C. 197; Whitaker v. Brown, 46 Pa. St. 197; Wardell v. Watson, 93 Mo. 107; Snoddy v. Bolen, 122 Mo. 479, 25 S. W. Rep. 932; Sloan v. Lawrence Furnace Co. 29 Ohio St. 568.

<sup>4</sup> Cardigan v. Armitage, 2 B. & C. 197.

<sup>5</sup> Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290, 322, per Wells, J.

<sup>6</sup> §§ 537, 538; Snoddy v. Bolen, 122 Mo. 479, 25 S. W. Rep. 932.

<sup>7</sup> Ashcroft v. Eastern R. Co. 126 Mass. 196, 30 Am. Rep. 672.

the ore. That which is reserved is merely a license to enter upon the granted premises and extract a limited quantity of ore.<sup>1</sup>

Where a railroad company, before its line of road had been located, reserved and excepted a strip of land for a right of way should the line be located over the granted land, a mere easement of a right of way was created. There was no exception of the strip from the operation of the grant, but the ownership in fee of the whole tract described in the deed passed to the grantee. At the time of the execution of the deed no road had been located over the granted land, but the railroad company deemed it possible that it might, at some time in the future, extend its road, or a branch of it, over the land. No particular portion of the land was excepted from the operation of the deed, but a new right to issue out of the land conveyed was provided for in case the railroad company should wish to use it. This must be construed as a reservation of a right of way.<sup>2</sup>

**509.** An exception, so called by the parties, may be in fact a reservation. If the thing excepted is a new right carved out of that which the grantor conveyed, it is in fact a reservation. Whether a provision creates an exception or a reservation is always to be determined from its nature and effect, and not from the name given to it.<sup>3</sup> An exception of a strip on one side of the granted land for a road may be held, under the circumstances surrounding the transaction, to be a reservation merely of a right of way for a road, and not an exception of the fee of the strip.<sup>4</sup> Thus an exception of a strip of land from one side of a lot, to be used as an alley to the adjoining lots, is a reservation in favor of the grantor, and it is not the grant of a right of way over the adjoining lots in favor of the grantee.<sup>5</sup>

**510.** Though a reservation must be of something out of the thing granted, the grantor may, by apt words, acquire some right in the grantee's estate. "It is not, however," says Chief Justice Shaw, "strictly by way of reservation, but by way

<sup>1</sup> *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

<sup>2</sup> *Biles v. Tacoma, &c. R. Co.* 5 Wash. 509, 32 Pac. Rep. 211. See, also, *Dunstan v. Northern Pac. R. Co.* 2 N. D. 46, 49 N. W. Rep. 426.

<sup>3</sup> *Stockwell v. Couillard*, 129 Mass. 231; *Hurd v. Curtis*, 7 Met. 94; *Cowdrey v.*

*Colburn*, 7 Allen, 9; *Fischer v. Laack*, 76 Wis. 313, 45 N. W. Rep. 104; *Winthrop v. Fairbanks*, 41 Me. 307; *Whitaker v. Brown*, 46 Pa. St. 197; *Biles v. Tacoma, &c. R. Co.* 5 Wash. 509, 32 Pac. Rep. 211.

<sup>4</sup> *Abraham v. Abbott*, 8 Oreg. 53.

<sup>5</sup> *Fischer v. Laack*, 76 Wis. 313, 45 N. W. Rep. 104.



of condition or implied covenant, even though the term 'reserving' or 'reservation' is used. If a grant is made to A, reserving the performance of a duty, to wit, the payment of a sum of money to a third person for the benefit of the grantor, an acceptance of the grant binds A to the payment of the money.<sup>1</sup> So, where a demise is made to A, reserving a rent in money or in service, it is not strictly a reservation out of the demised premises; but the acceptance of it raises an implied obligation to pay the money. So we think a grant may be so made as to create a right in the grantee's land in favor of the grantor. For instance: suppose A has close No. 2, lying between two closes, Nos. 1 and 3, of B; and A grants to B the right to lay and maintain a drain from close No. 1 across his close No. 2, thence to be continued through his own close, No. 3, to its outlet; and A in his grant to B should reserve the right to enter his drain, for the benefit of his intermediate close, with the right and privilege of having the waste water therefrom pass off freely through the grantee's close No. 3 forever. In effect this, if accepted, would secure to the grantor a right in the grantee's land; but we think it would inure by way of implied grant or covenant, and not strictly as a reservation. It results from the plain terms of the contract."<sup>2</sup>

The right to light and air passing over land is an easement, which may be acquired by reservation, though it is strictly an easement newly created by way of grant from the grantee in the deed of the estate to the grantor.<sup>3</sup> Thus, if a grantor in conveying land reserves the right to the "free use of light and air over said tract" conveyed, the reservation is equivalent to the grant of an easement of light and air by the grantee to the grantor in favor of the land retained by the latter.

**511. A reservation need not be annexed to any particular estate, nor be limited as to the place or manner of its enjoyment.**

<sup>1</sup> *Goodwin v. Gilbert*, 9 Mass. 510.  
<sup>2</sup> *Dyer v. Sanford*, 9 Met. 395, 405, 43 Am. Dec. 399. The court adhered to this ruling in the subsequent case of *Bowen v. Conner*, 6 Cush. 132, declaring that "it is immaterial whether the easement for the way intended to be established is technically considered as founded on an exception, a reservation, or an implied grant."

For further illustrations of the doctrine

that an equitable easement in the grantee's land may be created by a deed which he accepts as grantee, see *Emerson v. Moon-ey*, 50 N. H. 315.

<sup>3</sup> *Hagerty v. Lee*, 54 N. J. L. 580, 25 Atl. Rep. 319, citing Washb. Easem. 20; *Durham & S. Ry. Co. v. Walker*, 2 Q. B. 940; *Wickham v. Hawker*, 7 Mees. & W. 63; *Dyer v. Sanford*, 9 Metc. 395, 43 Am. Dec. 399. And see *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. Rep. 503.

"A right of way may be as well created by a reservation or exception in the deed of the grantor, reserving or retaining to himself and his heirs a right of way, either in gross or as annexed to lands owned by him, so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged, granting such way either in gross or as appurtenant to other estate of the grantee."<sup>1</sup> And so a grantor may reserve to himself, his heirs and assigns, the right of taking water from a spring situated upon the land conveyed, through pipes of certain dimensions, though the right is not annexed to any particular estate, or limited as to the place or manner of its enjoyment. The right is an interest in the land, and is assignable. "We are aware of no case," say the Supreme Court of Massachusetts, "which denies that the right to an aqueduct may be so created as to exist independently of any particular parcel of land owned by the grantee thereof, and be enjoyed by him and his heirs on any estate which he or they may own or acquire, and be capable of assignment or conveyance in gross. The water itself may not be the subject of property, but the right to take it and to have pipes laid in the soil of another for that purpose, and to enter upon the land of another to lay, repair, and renew such pipes, is an interest in the realty, assignable, descendible, and devisable."<sup>2</sup>

512. A reservation by verbal agreement entered into prior to the execution of the deed, inconsistent with the deed, is void, and evidence of it is inadmissible.<sup>3</sup> A parol reservation of

<sup>1</sup> *Bowen v. Conner*, 6 Cush. 132, 137, per Shaw, C. J.

<sup>2</sup> *Goodrich v. Burbank*, 12 Allen, 459, 461, 90 Am. Dec. 161, per Foster, J. On this subject Judge Curtis, in a case in the Circuit Court of the United States, said: "I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by pipes to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house, or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate

land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house. But these may be acquired afterwards. Incorporeal rights may be inseparably annexed to a particular messuage, or tract of land, by the grant which creates them, and makes them incapable of separate existence. But they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land, and again severed therefrom by a conveyance of the messuage or land without the right, or a conveyance of the right without the land." *Lonsdale Co. v. Moies*, 21 Law Rep. 658, 664.

<sup>3</sup> *Smith v. Price*, 39 Ill. 28, 89 Am. Dec.

a crop upon the land conveyed is not binding as against such deed, though a parol license by the grantee after the execution of the deed, if acted upon and the crop is severed before the revocation of the license, will vest the title to the crop severed in the licensee.<sup>1</sup>

But a parol reservation of an easement in land granted is not within the statute of frauds, when the grantee has accepted the grant with the reservation, has constructed the improvements necessary for the enjoyment of the easement, and has allowed the grantor and his assigns to use such easement for more than thirty years.<sup>2</sup>

A grantee, under a deed made by an attorney in fact, cannot object to a reservation therein that the attorney had no power to make it. The grantee is bound by his acceptance of the deed, and to prove the reservation it is unnecessary to introduce the power under which the deed was made.<sup>3</sup>

**513. An agreement in a deed to construct a way across the land operates as a reservation or implied grant to create an easement over the land for the benefit of the grantor's other land.** Though the agreement is that the way shall be constructed and kept open as a public way until it should be accepted as a public street, it does not make it any the less a reservation for the grantor's benefit.<sup>4</sup>

An absolute deed and a bond by the grantee to the grantor, conditioned *inter alia* that the grantor should have a certain part of the crops produced upon the land conveyed during his life, and should have the privilege of opening oil wells and at his pleasure removing the machinery of such wells, do not amount to a reservation or exception of anything out of the conveyance; but the grantor's rights are measured by the provisions of the bond, which is merely the personal obligation of the grantee. The right to remove the machinery is purely a personal privilege of the grantor during his life, and cannot be exercised after his death.<sup>5</sup>

**514. An exception is not defeated because the property**

284; *Damery v. Ferguson*, 48 Ill. App. 224.

<sup>1</sup> *Carter v. Wingard*, 47 Ill. App. 296.

<sup>2</sup> *Ague v. Seltsinger*, 85 Iowa, 305, 52 N. W. Rep. 228.

<sup>3</sup> *Waco Bridge Co. v. Waco*, 85 Tex. 320, 20 S. W. Rep. 137.

<sup>4</sup> *Hathaway v. Hathaway*, 159 Mass. 584, 35 N. E. Rep. 85.

<sup>5</sup> *Shields v. Delo*, 145 Pa. St. 393, 22 Atl. Rep. 701, 28 W. N. Cas. 427.

excepted is not used for the purpose declared in the exception. A grantor who states in his deed that he excepts a certain portion of the land, because he wants it for a certain purpose, cannot be held to have conveyed that which he has expressly excluded because he afterwards devotes it to a different purpose. The excepted land was not included in the grant, and no title to it passed.<sup>1</sup>

**515.** A statement in a deed that the conveyance is subject to a mortgage, lease, or other incumbrance named, is an exception of the rights outstanding under such mortgage, lease, or other incumbrance. If a deed is made subject to a certain lease executed by the grantor, it excepts from its operation only the rights of the lessee, and not the privileges reserved to the lessor.<sup>2</sup>

## II. *General Requisites and Rules of Construction.*

**516.** A reservation, exception, or condition which is repugnant to the grant is void.<sup>3</sup> So is a prohibition of the use of the property inconsistent with the title granted.<sup>4</sup> Thus, if one conveys twenty acres of land, excepting one acre, the exception is contradictory, and must be rejected. So if one conveys a moiety of a parcel, and in a subsequent clause says he meant to convey a fourth part, or excepts one half of this moiety. The grantor cannot have the benefit of an interpretation or of an exception which he has introduced into the deed which has the effect of destroying his own grant.<sup>5</sup>

<sup>1</sup> *Mayor v. New York Cent. &c. R. Co.* 69 Hun, 324, 326, 23 N. Y. Supp. 562, per Van Brunt, P. J.

<sup>2</sup> *Shelby v. Chicago, &c. R. Co.* 143 Ill. 385, 32 N. E. Rep. 438, 42 Ill. App. 339.

<sup>3</sup> *Shep. Touch.* 129, 130; *Daniel v. Veal*, 32 Ga. 589; *Pyncheon v. Stearns*, 11 Met. 312, 45 Am. Dec. 210; *Cutler v. Tufts*, 3 Pick. 272; *Gay v. Walker*, 36 Me. 54, 58 Am. Dec. 734; *Littlefield v. Mott*, 14 R. I. 288; *Young, Petitioner*, 11 R. I. 636; *Stockwell v. Couillard*, 129 Mass. 231, 233. Per Endicott, J.: "Every exception may be said to be inconsistent with the grant, but it is not void because inconsistent; it must be so inconsistent with the grant itself, that is, so repugnant

to it, that the grant would be practically inoperative, and, as it cannot be presumed that this was the intention, the exception in such case must be treated as invalid."

In *Alabama* it is provided by statute that when the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor must be taken as the absolute owner of the estate conveyed, as to the right of creditors and purchasers. Code, 1886, § 1849.

<sup>4</sup> *Craig v. Wells*, 11 N. Y. 315.

<sup>5</sup> *Cutler v. Tufts*, 3 Pick. 272. But where a deed described the land conveyed by courses and distances, and conveyed no specific number of acres, it was competent for the grantor to except a swamp or

An exception of a parcel specifically granted is void for repugnancy. The exception will not, however, be declared repugnant unless it is so inconsistent with the general grant that both cannot stand together. Effect will be given to the intention of the parties if practicable.<sup>1</sup>

An exception of a tract of land described by metes and bounds, which include a portion of another tract previously conveyed by the grantor to the grantee, is repugnant to the prior grant, and has no effect as against it.<sup>2</sup> The exception of a lot out of a larger grant does not estop the grantee from setting up a title to the excepted lot afterwards acquired through a source hostile to the title of the grantor; and it does not matter that the clause containing the exception declares that such lot "remains vested" in the grantor.<sup>3</sup>

A conveyance of a parcel of land by metes and bounds passes all the grantor's interest in the land described. It includes all mines and minerals and other rights beneath the surface, unless these are excepted or reserved. If, therefore, in such a conveyance the grantor, more particularly describing the subject-matter conveyed, adds "that is, the one half of the mineral interest in the said land," this clause is to be regarded as subordinate to the general terms first used, and perhaps repugnant thereto. It cannot be construed as implying an exception of the other half of the minerals in the land, because there are no apt words of exception or certain description to keep any part of the minerals from passing by the grant. The two clauses of the deed may be reconciled by construing the second as embracing the entire mineral interest claimed in the land described in the first clause.<sup>4</sup>

517. The grantor of an absolute fee cannot reserve to himself the right to the purchase-price, or any part of it, upon a subsequent sale by the grantee of the land conveyed.<sup>5</sup> He cannot reserve to himself the damages which the land may sustain by the building of a railroad across it after the conveyance, though the railroad company had taken possession of the land before the

marsh from the operation of the deed. *Painter v. Pasadena Land & Water Co.* 91 Cal. 74, 27 Pac. Rep. 539.

<sup>1</sup> *Witt v. St. Paul & N. P. Ry. Co.* 38 Minn. 122, 35 N. W. Rep. 862; *Gay v. Walker*, 36 Me. 54, 58 Am. Dec. 734.

<sup>2</sup> *Hampton v. Helms*, 81 Mo. 631.

<sup>3</sup> *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 484.

<sup>4</sup> *Brown v. Cranberry Iron Co.* 59 Fed. Rep. 434.

<sup>5</sup> *De Peyster v. Michael*, 6 N. Y. 467, 492, 57 Am. Dec. 470; *Dennison v. Taylor*, 15 Abb. N. C. 439.

conveyance, but did not acquire title to it till afterwards.<sup>1</sup> A reservation of "all the damages sustained in consequence of the railroad crossing the lands conveyed" relates to damages already sustained, and not to those to be suffered after the making of the deed.<sup>2</sup> But a grantor may reserve damages already awarded him for a right of way over the granted land, but not paid at the time of the conveyance.<sup>3</sup>

518. When land is conveyed by general terms, an exception of some portion of it from the grant is valid.<sup>4</sup> Thus, if one conveys a block of land containing several lots, not naming them, but describing the whole as one parcel, he may except one or more of the lots. The exception in such case is regarded as limiting the general description in the grant, and is therefore not repugnant to it. This is certainly the rule where the exception appears in the description as part of the substance of the granting clause.<sup>5</sup> One may convey a farm, excepting the land covered by wood or timber. One may convey land described by courses and distances, and except from the operation of the grant the marshy or swampy lands within the boundaries.<sup>6</sup> One may convey a tract of land and except from it a smaller parcel described by metes and bounds.<sup>7</sup> When there is no express grant, a restrictive clause is not considered contradictory or repugnant. Thus, if a grantor describes a tract of land without mentioning a stream included within its bounds, and then declares that it is the intention of the deed to convey to the grantee so much of the privilege of the water as shall be sufficient for the use of a fulling-mill, whenever there is sufficient therefor, the clause is not repugnant to the grant, but is a good reservation of the surplus water.<sup>8</sup> The fact that a grantor reserves the use of a certain part of the land for purposes specified affords a presumption that

<sup>1</sup> *Dennison v. Taylor*, 15 Abb. N. C. 439.

<sup>2</sup> *Dennison v. Taylor*, 15 Abb. N. C. 439.

<sup>3</sup> *Richardson v. Palmer*, 38 N. H. 212.

<sup>4</sup> *Sprague v. Snow*, 4 Pick. 54; *Stockwell v. Couillard*, 129 Mass. 231; *Cutler v. Tufts*, 3 Pick. 272; *Babcock v. Latterner*, 30 Minn. 417, 15 N. W. Rep. 689; *Witt v. St. Paul & N. P. Ry. Co.* 38 Minn. 122, 35 N. W. Rep. 862; *Howe v. Sadler* (Ky.), 25 S. W. Rep. 277.

<sup>5</sup> *Greenleaf v. Birth*, 6 Pet. 302; *Babcock v. Latterner*, 30 Minn. 417, 15 N. W. Rep. 689; *Koenigheim v. Miles*, 67 Tex. 113, 2 S. W. Rep. 81; *Cravens v. White*, 73 Tex. 577, 11 S. W. Rep. 543.

<sup>6</sup> *Painter v. Pasadena, &c. Co.* 91 Cal. 74, 27 Pac. Rep. 539.

<sup>7</sup> *Watkins v. Tucker*, 84 Tex. 428, 19 S. W. Rep. 570; *Koenigheim v. Miles*, 67 Tex. 113, 121, 2 S. W. Rep. 81.

<sup>8</sup> *Sprague v. Snow*, 4 Pick. 54.

the title to such reserved part passed with the other land to the grantee, and such presumption can be overcome only by very satisfactory and convincing evidence.<sup>1</sup>

An exception out of the land described by metes and bounds of a part covered by a certain lease is an exception of the fee of such part. If it had been intended to convey the fee of the whole parcel, this would naturally have been done by simply adding the words "subject to the lease named."<sup>2</sup>

519. When the terms used in excepting a parcel out of a grant are too vague and uncertain to enable such parcel to be located, the exception will be ineffectual to exclude any portion of the territory from the defined tract.<sup>3</sup> The language of a reservation must be as explicit as that of a grant. A provision in a deed that "sixteen feet east of said house shall be kept open as far back as the south end of said house" cannot be construed to be a reservation of a right of way, for the clause does not express or import the idea of a reserved right of way.<sup>4</sup> But effect will be given to a reservation vague in its terms if the intention of it is apparent. Thus, in a conveyance of a lot bounded on tide-water, a reservation "of all and every privilege around said lot" was held to operate as a reservation of the right to build a wharf.<sup>5</sup>

Ambiguity in the description of land excepted does not, however, make the conveyance itself void for uncertainty. The grantee and not the grantor has the benefit of the uncertainty.<sup>6</sup>

520. A part excepted from a grant must be as clearly described as the parcel granted.<sup>7</sup> As regards the boundaries of an excepted part, the same rules should apply that apply to a granted parcel. The facts and circumstances existing at the time of the conveyance are to be considered, if the terms used in the deed are ambiguous.<sup>8</sup> If a way appurtenant to a particular parcel of land belonging to the grantor is reserved, and the way

<sup>1</sup> *Small v. Wright*, 74 Me. 428.

*Johns*. 394; *Jackson v. Hudson*, 3 Johns.

<sup>2</sup> *Howe v. Saddler* (Ky.), 25 S. W. Rep. 277.

375.

<sup>3</sup> *Ditman v. Clybourn*, 4 Ill. App. 542; *McCormick v. Monroe*, 1 Jones, 13.

<sup>7</sup> Co. Litt. 142 a; *Cook v. Wesner*, 1 Cin. Sup. Ct. 249; *Darling v. Crowell*, 6 N. H. 421; *Grennan v. McGregor*, 78 Cal.

<sup>4</sup> *Wilder v. Wheeldon*, 56 Vt. 344.

258, 20 Pac. Rep. 559; *Truett v. Adams*, 66 Cal. 218, 5 Pac. Rep. 96.

<sup>5</sup> *Parker v. Rogers*, 8 Oreg. 183.

<sup>6</sup> *McAllister v. Honea*, 71 Miss. 256, 14 So. Rep. 264; *Jackson v. Gardner*, 8

<sup>8</sup> See *Bennett v. Caddell* (Ky.), 20 S. W. Rep. 274.

is not defined, the situation of the land and its natural features are elements in determining where the way shall be.<sup>1</sup> In an exception of "the bottom at the ford of the creek, which bottom is now under fence, and supposed to contain nine acres, more or less," the words "now under fence" should be considered as descriptive merely, and not as limiting the boundary; and, though the fence was set back from the creek out of the reach of the water, the exception should include the land up to the creek, although there is more than an acre of land outside the fence.<sup>2</sup>

An exception out of a grant of "one acre in the southeast corner, together with the buildings thereon," possession of which was retained by the grantor, should be construed to be an exception of one acre of land of such shape as to include the buildings, if a square acre in such corner would not include them.<sup>3</sup>

In a conveyance of a part of a section defined by a government survey, an exception of a certain number of acres on a designated side of the land is to be ascertained by taking a strip of land of uniform width across that side of the land sufficient to include the quantity named.<sup>4</sup>

521. An exception is good if the means of determining the excepted part are pointed out. It is a sufficient description of an excepted parcel to designate it by the name by which it is generally known, just as a grant is sufficiently described by such a name.<sup>5</sup> It is also a sufficient description of an excepted parcel to state that it is the same conveyed to the grantor by a person named, even if it appears from the records that the grantor made a mistake in reciting the given name of such person.<sup>6</sup> It is also a sufficient description to say that the reserved land is the same that the grantor has previously occupied for a certain purpose, when the occupation of the land for this purpose distinguishes it from the other land conveyed.<sup>7</sup>

An exception of land previously conveyed by the grantor is not void for uncertainty because the means is pointed out for

<sup>1</sup> *Brown v. Meady*, 10 Me. 391, 25 Am. Dec. 248.

<sup>2</sup> *Jones v. Motley* (Ky.), 13 S. W. Rep. 432.

<sup>3</sup> *Lego v. Medley*, 79 Wis. 211, 48 N. W. Rep. 375.

<sup>4</sup> *Johnson v. Ashland Lumber Co.* 47 Wis. 326, 2 N. W. Rep. 552.

<sup>5</sup> *Truett v. Adams*, 66 Cal. 21, 5 Pac. Rep. 96; *McCormick v. Monroe*, 1 Jones, 13; *Melton v. Monday*, 64 N. C. 295; *Eastern Carolina Land Co. v. Frey*, 112 N. C. 158, 16 S. E. Rep. 902.

<sup>6</sup> *Getchell v. Whittemore*, 72 Me. 393.

<sup>7</sup> *Reidinger v. Cleveland Iron M. Co.* 39 Mich. 30.



making the excepted part certain.<sup>1</sup> A deed of a large tract of land, excepting therefrom a tract of fifty acres sold to another person, does not pass to such grantee the legal title to such excluded tract, although no deed of this tract has been made to the person who purchased it.<sup>2</sup> If the parcel excepted be otherwise sufficiently described, the statement that it had been sold may be rejected as *falsa demonstratio*.<sup>3</sup> An exception of "all the lots heretofore sold," with no further description of the excepted lots, would necessarily cover only such lots as had in fact been sold, for in that case the sale of the lots was the only means of pointing them out.<sup>4</sup> In a grant by a State, an exception of a tract previously entered and surveyed is a valid exception.<sup>5</sup> So an exception of a portion of the land conveyed which is then occupied for certain purposes is valid, because the means of identification are supplied by the reservation itself.<sup>6</sup>

**522. An exception of a dower right already set off sufficiently describes both the estate and the boundaries of the land.** A reservation or exception of a dower right in the land already conveyed is a reservation of only such interest as the widow had a legal right to convey; and if she has conveyed in fee the land allotted to her, an exception in the deed of the heir of the dower right already conveyed is an exception of a life estate, and not of an estate in fee simple.<sup>7</sup>

An exception of a widow's right of dower not then assigned is a good exception, because this right may be made certain by setting it off.<sup>8</sup> An exception of land within the granted parcel

<sup>1</sup> *Cornwell v. Thurston*, 59 Mo. 156; *McCormick v. Monroe*, 1 Jones, 13; *King v. Wells*, 94 N. C. 344; *Rockafeller v. Arlington*, 91 Ill. 375; *Johnson v. Ashland Lumber Co.* 47 Wis. 326, 2 N. W. Rep. 552; *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 441.

<sup>2</sup> *Low v. Settle*, 32 W. Va. 600, 9 S. E. Rep. 922; *Roberts v. Robertson*, 53 Vt. 690, 38 Am. Rep. 710; *Rockafeller v. Arlington*, 91 Ill. 375.

<sup>3</sup> *Roberts v. Robertson*, 53 Vt. 690, 38 Am. Rep. 710.

<sup>4</sup> *Roberts v. Robertson*, 53 Vt. 690, 38 Am. Rep. 710, per Powers, J.

<sup>5</sup> *Brown v. Rickard*, 107 N. C. 639, 12 S. E. Rep. 570; *Midgett v. Wharton*, 102 N. C. 14, 8 S. E. Rep. 778.

<sup>6</sup> *Reidinger v. Cleveland Iron Co.* 39 Mich. 30.

<sup>7</sup> *Bird v. Cruse*, 114 N. C. 435, 19 S. E. Rep. 276; *Austin v. Willis*, 90 Ala. 421, 8 So. Rep. 94, where there was an administrator's sale excepting certain land allotted to the widow as dower.

<sup>8</sup> *Stockwell v. Couillard*, 129 Mass. 231, 234; *Canedy v. Marcy*, 13 Gray, 373; *Meserve v. Meserve*, 19 N. H. 240; *Swick v. Sears*, 1 Hill, 17; *Clark v. Cottrel*, 42 N. Y. 527. In the latter case it

previously conveyed by the grantor is a valid exception, because the means is pointed out for determining the excepted part.<sup>1</sup>

523. The construction of a reservation may be determined by the acts of the parties under the deed. The courts will not disregard the construction put upon the reservation by the acts and conduct of the parties for a period of years following the conveyance.<sup>2</sup> Thus, where there was an exemption and reservation "of sixty-eight feet of land from the east end of the described premises," and the grantor retained possession of a lot of that width along the whole east side of the land, putting the purchaser in possession of the remainder, and the parties built a fence along the line thus fixed, and the grantor built a house and barn on the portion held by him, and after many years conveyed the tract as being sixty-eight feet wide, it was held that the acts of the parties established the interpretation that the exception was of a strip sixty-eight feet wide along the east side of the lot, and not merely of sixty-eight square feet, which would be a strip of the width of only six inches.<sup>3</sup> If the location of the excepted parcel or of a right of way is left to the election of the grantor, either expressly or impliedly, the uncertainty of location may be cured by his election within a reasonable time.<sup>4</sup> Until the right reserved is exercised it is inoperative, and the grantee may assert all the rights of an owner in fee.<sup>5</sup>

On an issue as to whether a person deceased executed a deed of certain property, reserving therein a life estate, declarations made by him after the alleged date of the deed, while in possession of the property, are inadmissible to show the character of his possession. But where it is necessary to inquire into the nature of a particular act, and the intention of the person who did it, proof of what that person said at the time of doing it is

was held that in a deed of a farm a reservation of thirty acres, which had been set off to the grantor's mother as her dower, was not merely an exemption of the dower interest, but an exception of that portion of the farm identified by reference to the assignment of dower.

<sup>1</sup> *Stockwell v. Couillard*, 129 Mass. 231; *Rockefeller v. Arlington*, 91 Ill. 375.

<sup>2</sup> *Jones v. De Lassus*, 84 Mo. 541; *Hardwick v. Laderoot*, 39 Mich. 419; *Choate v. Burnham*, 7 Pick. 274.

<sup>3</sup> *Monfort v. Stevens*, 68 Mich. 61, 35 N. W. Rep. 827. And see *Louk v. Woods*, 15 Ill. 256.

<sup>4</sup> *Benn v. Hatcher*, 81 Va. 25; *Hart v. Connor*, 25 Conn. 331; *Jackson v. Smith*, 9 Johns. 100.

<sup>5</sup> *Dygart v. Matthews*, 11 Wend. 35.

admissible as a part of the *res gestæ*, provided such act itself is material to the issue.<sup>1</sup>

**524. The grantor may reserve a rent for the granted property.** "If one grant land, yielding for rent money, corn, a horse, spurs, a rose, or any such like thing, this is a good reservation; but if the reservation be of the grass or of the vesture of the land, or of a common or other profit to be taken out of the land, then these reservations are void."<sup>2</sup> He may also make a reservation of his "support, comfort, and maintenance" by the grantee during the term of the grantor's natural life.<sup>3</sup> But a reservation not in the way of rent of the profits of the land, or a reservation of its annual products, such as the grass or the fruit, is not a good reservation; it is inconsistent with the grant.<sup>4</sup> Neither can a reservation be made of something that did not pass by the grant, and is not a legal right attached to or issuing out of the thing granted. Thus, in a conveyance of a sawmill, a reservation of "all the slabs made at said mill" is not a valid reservation. It is at most a covenant by the grantee that the grantor may take the slabs while the grantee owns the mill; but it is not a valid reservation as against subsequent purchasers.<sup>5</sup>

A reservation "of the full and entire profits, use, and control" of the land, during the life of the grantor, gives him no right to impair the freehold estate. He cannot cut timber upon the land

<sup>1</sup> *Robbins v. Spencer* (Ind.), 38 N. E. Rep. 522.

<sup>2</sup> *Sheppard's Touch*. 81.

<sup>3</sup> *Bates v. Swiger* (W. Va.), 21 S. E. Rep. 874.

<sup>4</sup> *Co. Litt.* 47 a; *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449; *Chapman v. Long*, 10 Ind. 465.

<sup>5</sup> *Adams v. Morse*, 51 Me. 497, 500. Per Kent, J.: "But surely everything that may be manufactured at a mill does not arise, come out of the thing granted, so as to become a part of the realty, or so as to be the subject of a grant or reservation in the conveyance of the estate. Whatever does come out may be, — as rent, or timber on the land granted. A gristmill, which derives its pay and its profits from toll in kind, as most of such mills do, may be granted, and a reservation of a portion of the toll, after it is separated, might be

good, if not void as being a part of the profits. Why? Because it is a thing issuing out of the mill granted, and separated as the mill's portion. But a reservation of one half of all the corn or wheat brought to that mill to be ground, by strangers, would not be. If a man should give a deed of a cotton factory and land therewith, it would hardly be contended that he might reserve every tenth yard of cotton cloth manufactured at the mill forever. So of a fulling-mill or a tannery. If slabs may be reserved in a deed of a sawmill, then every tenth board may be reserved, whoever may be the occupier. No man can thus attach another man's personal property to his realty, and either pass it or reserve it, simply on the ground that he, or his mill, have changed the form of it by manufacturing it."

except such as is necessary for improvements, in ordinary repairs, or ordinary firewood for himself, his wife, and tenants.<sup>1</sup>

One conveying a farm may reserve to himself during his lifetime pasturage for a cow.<sup>2</sup>

525. The reservation of a life estate in the land granted is not void as repugnant to the grant.<sup>3</sup> Though the language used by the grantor in the reservation be "all the right, title, and interest in and unto the above-named land and buildings for and during my natural life," no inference can be drawn that anything more than a life estate was intended to be reserved.<sup>4</sup> In a deed by a father to his children, a reservation of the use, management, and control of the property during his life, for the education, maintenance, and support of the grantees, is not repugnant to the grant. It is a reservation, not of a title or estate, but of a power to exercise an active trust in behalf of the grantees during the life of the grantor.<sup>5</sup> The grantor may reserve a power to create a life estate for the benefit of another in the land conveyed. Thus a deed reserved to the grantor "the power to devise, by last will, an undivided one third part of said premises unto any hereafter taken wife of him, the party of the first part, for and during the term of her natural life, or (at his option) to give and grant by deed, to said hereafter taken wife, or to any person in trust for her, the same premises, for and during the term of her natural life." It was held that the reservation was a right which the grantor might exercise or not, at his pleasure, and was not a special power in trust which equity would enforce.<sup>6</sup> A deed in which the grantor reserves the use and occupation of the land during his life may be operative as a covenant to stand seised to the use of the grantee in whom the estate vests in possession, upon the determination of the life estate.<sup>7</sup>

<sup>1</sup> *Stewart v. Wood*, 48 Ill. App. 378.

<sup>2</sup> *Bray v. Hussey*, 83 Me. 329, 22 Atl. Rep. 220.

<sup>3</sup> *Achorn v. Jackson*, 86 Me. 215; *Watson v. Cressey*, 79 Me. 381; *Drown v. Smith*, 52 Me. 141; *Wyman v. Brown*, 50 Me. 139; *McDaniel v. Johns*, 45 Miss. 632; *Hurd v. Hurd*, 64 Iowa, 414, 20 N. W. Rep. 740.

<sup>4</sup> *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Cates v. Cates* (Ind.), 34 N. E. Rep. 957; *Graves v. Atwood*, 52

Conn. 512, 52 Am. Rep. 610; *Colby v. Colby*, 28 Vt. 10; *Crosby v. Montgomery*, 38 Vt. 238.

<sup>5</sup> *Varner v. Rice*, 44 Ark. 236; *Richardson v. York*, 14 Me. 216.

<sup>6</sup> *Towler v. Towler*, 142 N. Y. 371, 36 N. E. Rep. 869.

<sup>7</sup> *West v. West*, 155 Mass. 317, 29 N. E. Rep. 582; *Jackson v. McKenny*, 3 Wend. 233, 20 Am. Dec. 690; *McDaniel v. Johns*, 45 Miss. 632; *Varner v. Rice*, 44 Ark. 236.

But where the owner of a farm conveyed to his son one half of it by description, reserving to himself the other part of the farm, describing it, "for and during his natural life, and after his decease to revert to the party of the second part and his heirs forever," it was held that no title to the land reserved passed to the grantee; Mr. Justice Campbell saying that "no estate can pass by deed that is not embraced plainly within the words of grant."<sup>1</sup>

526. A deed, in whatever terms, reserving to the grantor the enjoyment of the property during his life, is generally construed as a present conveyance of the fee to the grantee, subject to the reservation, and not as testamentary in character. Where the habendum clause of a formal conveyance in fee reserves to the grantors the right and use of the land during their natural lives, and the covenant of warranty contains the clause, "With the exception as above stated, the right of living and using said lot while they [the grantors] live," the right thus excepted out of the grant does not prevent the title from passing to the grantee.<sup>2</sup> And so where a grantor in a conveyance to his daughter reserved to himself, and, "should [his wife] survive him, then at his death she shall have for her own use the full right, title, and estate in the undivided one half of the whole of the above-described properties, or one half of the rents, issues, and profits thereof, for and during her natural life," it was held that such deed was not a will, but the reservations were entirely consistent with a presently passing estate in fee simple in the grantee.<sup>3</sup>

A general warranty deed in the statutory form contained, after the description, the following clause: "The grantor, C, hereby expressly excepts and reserves from this grant all the estate in said lands, and the use and occupation, rents and proceeds thereof, unto himself during his natural life." It was held that the reservation did not give the instrument a testamentary character, but passed a present estate in fee to the grantee, subject to a life estate in the grantor.<sup>4</sup> In a Georgia case the deed contained this

<sup>1</sup> Ryan v. Wilson, 9 Mich. 262.

<sup>2</sup> Cable v. Cable, 146 Pa. St. 451, 23 Atl. Rep. 223.

<sup>3</sup> Knowlson v. Fleming (Pa. St.), 30 Atl. Rep. 519. See Eckman v. Eckman, 68 Pa. St. 460; Waugh v. Waugh, 84 Pa. St. 350, 24 Am. Rep. 191; Dreisbach v. Serfass, 126 Pa. St. 32, 17 Atl. Rep. 513.

<sup>4</sup> Cates v. Cates (Ind.), 34 N. E. Rep. 957, Hackney, J., saying: "The intention to reserve a life estate is so clearly manifested by the words of reservation that it is difficult to believe that it was the intention to confer no interest upon the appellees until after his death. It is more difficult to believe that it was the grantor's

provision: "The title to the above-described tract of land to still remain in the said grantor for and during his natural life, and at his death to immediately vest in the said" grantee. It was held that the grantee took an immediate estate in fee, subject to a life interest in the grantor.<sup>1</sup>

A conveyance to one to hold "during the term of her natural life, and after her death to revert to" the grantor and his heirs, creates a life estate only in the grantee, the fee remaining in the grantor. The land subject to the life estate may be sold to pay the grantor's debts. The provision in the grantor's words, "to revert to me and my heirs," is not a granting phrase, and therefore does not create a limitation. The fee cannot remain in abeyance, except in cases of necessity, and in the case in hand there is nothing in the deed that requires the passing of the fee from the grantor.<sup>2</sup> And so a deed to a grantee to hold "during the term of her natural life," and after death for the use of the grantor, "as fully and to all intents and purposes as if this deed had never been executed," gives the grantee only a life estate, inasmuch as the deed does not in express terms convey a fee, and the intention to convey a less estate is clearly expressed.<sup>3</sup>

**527.** Even a declaration that the deed shall not go into effect until the death of the grantor does not give it a testamentary character.<sup>4</sup> Thus where a deed provided that the land should be divided between the grantees at the decease of the

intention to expressly withhold the fee from the grantees until after his death, for to have done so by the exception would have rendered the reservation of the 'use and occupation, rents and proceeds,' an idle ceremony."

<sup>1</sup> *White v. Hopkins*, 80 Ga. 154, 4 S. E. Rep. 863, the court citing *Cumming v. Cumming*, 3 Kelly, 460; *Spalding v. Grigg*, 4 Ga. 75; *Robinson v. Schly*, 6 Ga. 515; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Moye v. Kittrell*, 29 Ga. 677; *Bunn v. Bunn*, 22 Ga. 472; *Watson v. Watson*, 22 Ga. 460; *Meek v. Holton*, 22 Ga. 491; *Johnson v. Hines*, 31 Ga. 720. In the last case the grant was "to have and to hold, after my death, the aforesaid property." See, also, *Williams v. Tolbert*, 66 Ga. 127; *Hall v. Burkham*,

59 Ala. 349; *Griffith v. Marsh*, 86 Ala. 302, 5 So. Rep. 569; *Daniel v. Hill*, 52 Ala. 430; *Bunch v. Nicks*, 50 Ark. 367.

<sup>2</sup> *Clark v. Hillis* (Ind.), 34 N. E. Rep. 13.

<sup>3</sup> *Kelly v. Hill* (Md.), 25 Atl. Rep. 919. And see *Winter v. Gorsuch*, 51 Md. 180; *Farquharson v. Eichelberger*, 15 Md. 63.

<sup>4</sup> *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. Rep. 563; *Shackelton v. Sebree*, 86 Ill. 616; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Wyman v. Brown*, 50 Me. 139; *Abbott v. Holway*, 72 Me. 298; *Chancellor v. Windham*, 1 Rich. 161, 42 Am. Dec. 411; *Owen v. Williams*, 114 Ind. 179, 15 N. E. Rep. 678; *Philips v. Lumber Co.* (Ky.) 22 S. W. Rep. 652; *Reynolds v. Towell* (Ky.), 11 S. W. Rep. 202; *Waugh v. Waugh*, 84 Pa. St. 350.

grantor, and that then the title should vest in them absolutely, it was held that it vested a present estate in fee simple, possibly reserving a life estate. The court said: "The rule is, that unless an instrument, which has been fully executed, from every point of view seems to be a nullity, it will not be intended that the parties meant that it should be invalid, and some effect will, if possible, be given it."<sup>1</sup>

Where a father conveyed land to his son, reserving a life estate to himself and another, on condition that yearly payments should be made to them during their lives, with a provision that at the death of the grantor the title should be in the grantee, it was held that the son took a vested remainder at the time the deed was executed. His title was therefore superior to that of a mortgage executed by the father after the recording of the deed to the son.<sup>2</sup>

**528. A reservation to a third person, not a party to the deed, is void.<sup>3</sup>** The same is true of a condition or of a restriction by way of an implied covenant.<sup>4</sup> Thus, if the owner of land in making a covenant reserves a privilege in the well on the granted premises for the lots owned by third persons named, the reservation is inoperative as being made to strangers to the deed. This

<sup>1</sup> *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. Rep. 726. The cases of *Turner v. Scott*, 51 Pa. St. 126, and *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. Rep. 522, seem to be in conflict with the numerous cases cited in this and the preceding section. *Babb v. Harrison*, 9 Rich. Eq. 111, 70 Am. Dec. 203.

<sup>2</sup> *Hitchcock v. Simpkins*, 99 Mich. 198, 58 N. W. Rep. 47.

<sup>3</sup> *Shep. Touch.* 80; *Stockwell v. Couillard*, 129 Mass. 231, 233; *Murphy v. Lee*, 144 Mass. 371, 11 N. E. Rep. 550; *Hornbeck v. Westbrook*, 9 Johns. 73; *Ives v. Van Anken*, 34 Barb. 566; *Walrath v. Redfield*, 18 N. Y. 457; *Blackman v. Striker*, 142 N. Y. 555, 37 N. E. Rep. 484; *Bridger v. Pierson*, 1 Lans. 481, 45 N. Y. 601; *Jackson v. Swart*, 20 Johns. 85, 87; *Voorhees v. Presbyterian Church*, 8 Barb. 135, 147; *Borst v. Empie*, 5 N. Y. 33, 38; *Craig v. Wells*, 11 N. Y. 315; *Corning v. Troy Iron Factory*, 40 N. Y. 191,

209; *Schaidt v. Blaul*, 66 Md. 141; *Herbert v. Pue*, 72 Md. 307, 20 Atl. Rep. 182; *Littlefield v. Mott*, 14 R. I. 288; *Young, Petitioner*, 11 R. I. 636. In this case the grantor reserved a life estate in the realty conveyed, and "also the right and privilege, for those who may be appointed to settle my affairs after my decease, to cut off and sell all the wood and timber—or so much thereof as may be necessary to pay whatever debts I may owe, and the expense of my last sickness and funeral expenses, after my personal property left at my decease shall have been appropriated and used for that purpose, growing upon the ten acres of the easterly part of said premises." This provision was held void as a reservation because made to others than the grantor.

<sup>4</sup> *Shep. Touch.* 120; *Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515; *Craig v. Wells*, 11 N. Y. 315.

rule of construction is not changed by the fact appearing that the grantor was at the time of the conveyance in possession of one of the lots under a contract of purchase, the lot being owned at that time by a stranger, as recited in the deed.<sup>1</sup> A reservation for the benefit of the grantor and his successors cannot be taken advantage of by persons not claiming title through the grantor.<sup>2</sup> A reservation in favor of a third person, though not good as a reservation, has sometimes been held to preclude the grantor from interfering with the exercise of the right nominally reserved.<sup>3</sup> But a reservation is considered as made to the grantor when valuable rights are secured to him, although others may also be benefited by the reservation, as where one granted a lot of land opposite his house, "to be in common and unoccupied."<sup>4</sup>

An attorney in fact executing a deed for his principal cannot make a good reservation to himself and his descendants. He is a stranger to the deed, and no interest can vest in him, and much less in his descendants, by a reservation.<sup>5</sup>

Under a reservation of a right of several use to two or more persons, either of them may maintain an action for damages resulting from the obstruction or interference with the enjoyment thereof, without joining with him others not affected by the obstruction or interference complained of.<sup>6</sup>

**529.** But although a reservation will not give any title to a stranger, it may operate as an exception to the grant, if such appears to be the intention of the parties. The tendency of the decisions upon this subject is to give effect to the intention of the parties as manifested by the whole instrument, without much regard to the strict literal sense of the terms used.<sup>7</sup> The Supreme Court of Michigan in a recent case say:<sup>8</sup> "From an

<sup>1</sup> *Ives v. Van Auken*, 34 Barb. 566.

<sup>6</sup> *Herbert v. Pue*, 72 Md. 307, 20 Atl. Rep. 182.

<sup>2</sup> *Moulton v. Faught*, 41 Me. 298. It is competent for a grantor to reserve an easement for burial purposes for himself and the other heirs of his father. *Blackman v. Striker*, 142 N. Y. 555, 37 N. E. Rep. 484, 29 Abb. N. C. 467, 21 N. Y. Supp. 563.

<sup>3</sup> *Hodge v. Boothby*, 48 Me. 68; *Knight v. Mains*, 12 Me. 41.

<sup>4</sup> *Gay v. Walker*, 36 Me. 54, 58 Am. Dec. 734.

<sup>5</sup> *Herbert v. Pue*, 72 Md. 307, 20 Atl. Rep. 182.

<sup>7</sup> *Martin v. Cook* (Mich.), 60 N. W. Rep. 679, citing *Shep. Touch.* 86; *Bridger v. Pierson*, 45 N. Y. 601; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Richardson v. Palmer*, 38 N. H. 212; *Corning v. Nail Factory*, 40 N. Y. 191, 209; *Hall v. Ionia*, 38 Mich. 493; *Ericson v. Iron Co.* 50 Mich. 604, 16 N. W. Rep. 161; *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. Rep. 984.

<sup>8</sup> *Martin v. Cook* (Mich.), 60 N. W. Rep. 679.



examination of the cases cited, and the decisions of the courts of this country generally upon the question here involved, it will be observed that, while the rule that a reservation in favor of a stranger to the instrument is invalid as a reservation has been adhered to, yet, in order to effectuate the intention of the grantor, such a reservation has uniformly been treated as excepting from the grant the thing reserved. Nor has this holding been confined to cases where the reservation had been previously carved out. It has been repeatedly held that a conveyance of land, reserving or excepting the dower interest of a stranger to the deed, was a good exception."<sup>1</sup> In the case from which this quotation is made it was held that, where the grantor reserved to himself and to his daughter, who was a stranger to the deed, an estate for the lives of both in the property conveyed, the reservation of the life estate was valid as an exception to the grant in the deed.

The owner of land, over which a third person had a right of way, in conveying it reserved to such person the right of way. It was held that, although strictly a reservation in a deed is ineffectual to create a right of way in any person not a party thereto, yet, there being in fact a right of way existing at the time of the grant, the clause must be construed as an exception from the property conveyed.<sup>2</sup> In a similar case a grantor reserved to a stranger to the deed "the right he has to the ore-bed, and the right of way to the West Point foundry as now used." The court say: "A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception."<sup>3</sup> A grantor in conveying land reserved one acre to a stranger to the deed. It was held that as a reservation it would be void, it being in behalf of a stranger to the deed. It was therefore held to be an exception of the acre, although the stranger took nothing.<sup>4</sup>

**530. A reservation expressed to be in favor of the public confers no rights in favor of any one except the grantor,**<sup>5</sup>

<sup>1</sup> *Canedy v. Marcy*, 13 Gray, 373; *Meserve v. Meserve*, 19 N. H. 240; *Crosby v. Montgomery*, 38 Vt. 238; *Swick v. Sears*, 1 Hill (N. Y.), 17.

<sup>2</sup> *Bridger v. Pierson*, 45 N. Y. 601.

<sup>3</sup> *West Point Iron Co. v. Reymert*, 45 N. Y. 703.

<sup>4</sup> *Corning v. Troy Iron Factory*, 40 N. Y. 191, 209.

<sup>5</sup> *Hill v. Lord*, 48 Me. 83; *Elliot v. Small*, 35 Minn. 396, 59 Am. Rep. 329; *Hornbeck v. Westbrook*, 9 Johns. 73.

though there are intimations in some cases that such a reservation is valid in favor of the public.<sup>1</sup> The reservation in such case may operate as an exception from the grant, and as notice to the grantee of adverse claims or rights as to the thing reserved.<sup>2</sup> In general it may be said that an exception or reservation may recognize existing rights in third persons who are not parties to the deed.<sup>3</sup> A reservation of a portion of the land conveyed, that portion being "now owned and occupied by" a third person, is merely a recognition of the title of such third person, and not a declaration of trust in his favor.<sup>4</sup> A reservation of the right to open a highway on one side of the granted land, with a provision that, if the highway shall be laid out, all the grantor's rights in it shall pass to the grantee, gives the grantor a right to dedicate the reserved land for a highway.<sup>5</sup>

A reservation was held to operate as an exception where one made a conveyance of a farm, "reserving to the public the use of the road through said farm, also reserving to the White Mountains Railroad the roadway for said road, as laid out by the railroad commissioners, and also reserving to myself the damages appraised for said railroad way by the commissioners." The court say: "The result at which we arrive, therefore, upon a careful examination of the deed, and a deliberate consideration of all the circumstances under which it was executed, is that the plaintiff must have intended to sell, and the grantee to purchase, the farm, just as it was at the date of the conveyance, subject to the incumbrance of the public highway and of the White Mountains Railroad, as laid out through it; the plaintiff retaining his claim for the unpaid damages awarded for the laying out

<sup>1</sup> *Tuttle v. Walker*, 46 Me. 280; *Cincinnati v. Newell*, 7 Ohio St. 37.

<sup>2</sup> *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Hill v. Lord*, 48 Me. 83.

<sup>3</sup> *Murphy v. Lee*, 144 Mass. 371, 11 N. E. Rep. 550; *Wood v. Boyd*, 145 Mass. 176, 13 N. E. Rep. 476; *Cornwell v. Thurston*, 59 Mo. 156. In *Murphy v. Lee*, *supra*, the deed contained these words: "There is a passageway on the southeasterly side of the said premises, which is to be used in common with the abutments thereon." A third person owned land abutting on the land so conveyed.

At the time of the conveyance there was a passageway four feet wide over which a right of way had been conveyed by the grantor as appurtenant to adjoining land which he had before that time conveyed. It was held that the right of way reserved in the words above quoted was not reserved as appurtenant to the land of such third person. It is an exception from the grant of an existing right of way, and does not create a new right.

<sup>4</sup> *King v. Bishop*, 62 Miss. 553.

<sup>5</sup> *Dunn v. Sanford*, 51 Conn. 443.

of the railroad; and that proper and apt words were used in the deed of conveyance to carry out that intention, without resorting to any doubtful construction, or giving to the grantee any advantage from the imperfection or uncertainty of the phraseology employed; the words expressing a reservation being made to operate, as only under the circumstances they can operate, as an exception to the general terms of the grant which precedes them."<sup>1</sup>

**531. An exception or reservation is construed most strongly against the grantor, on the ground that the words are *lis*.**<sup>2</sup> When, however, the intention of the parties can be fairly ascertained from the instrument, such intention must govern its construction.<sup>3</sup> If the terms of the instrument leave the intention of the parties uncertain and susceptible of more than one interpretation, the court will look to the surrounding circumstances existing when the deed was executed, such as the situation of the parties and of the subject-matter of the deed.<sup>4</sup> The meaning of a reservation may often be determined by the expression of the purpose for which it was made.<sup>5</sup>

<sup>1</sup> *Richardson v. Palmer*, 38 N. H. 212.

<sup>2</sup> *Shep. Touch.* 87; *Blackman v. Striker*, 142 N. Y. 555, 37 N. E. Rep. 484; *Jackson v. Gardner*, 3 Johns. 394; *Jackson v. Hudson*, 3 Johns. 375, 3 Am. Dec. 500; *Duryea v. Mayor*, 62 N. Y. 592; *Ives v. Van Auken*, 34 Barb. 566; *Jackson v. Myers*, 3 Johns. 388; *Grafton v. Moir*, 130 N. Y. 465, 29 N. E. Rep. 974; *Provost v. Calder*, 2 Wend. 517; *Borst v. Empie*, 5 N. Y. 33, 40; *Craig v. Wells*, 11 N. Y. 315; *Noble v. Ill. Cent. R. R. Co.* 111 Ill. 437; *Sharp v. Thompson*, 100 Ill. 447, 450, 39 Am. Rep. 61; *Alton v. Ill. Trans. Co.* 12 Ill. 38, 58, 52 Am. Dec. 479; *Cates v. Cates* (Ind.), 34 N. E. Rep. 957, per *Hackney, J.*; *Scott v. Michael*, 129 Ind. 250, 28 N. E. Rep. 546; *Darling v. Crowell*, 6 N. H. 421; *Dana v. Conant*, 30 Vt. 246; *Green Bay Canal Co. v. Hewitt*, 66 Wis. 461, 29 N. W. Rep. 237; *Elliot v. Small*, 35 Minn. 396, 59 Am. Rep. 329. Thus in a lease a reservation of "all timber trees and other trees, but not the annual fruit thereof," was held not to apply to apple-trees, for the word "trees" does

not generally include orchard trees, but only trees for timber; and the word "fruit" was in the old books used to denote the product of timber trees. At any rate, it being doubtful whether it was intended to except fruit trees, the words of exception are construed favorably to the lessee. *Bullen v. Denning*, 5 B. & C. 842. A reservation in a deed of land by a railroad company, "reserving and excepting . . . a strip extending through the same . . . of the width of 400 feet,—that is, 200 feet on each side of the centre line of the railroad, or any of its branches,—to be used for right of way," covers one such strip only; and, under such reservation, the railroad company cannot claim a right of way, both for its main line and a branch line, over the tract so conveyed. *Dunstan v. Northern Pac. R. Co.* 2 N. D. 46, 49 N. W. Rep. 426.

<sup>3</sup> *Wiley v. Sidronus*, 41 Iowa, 224; *Wardell v. Watson*, 93 Mo. 107.

<sup>4</sup> *French v. Carhart*, 1 N. Y. 96.

<sup>5</sup> *Keeler v. Wood*, 30 Vt. 242; *Hays v. Askew*, 5 Jones, 63.

An exception of the fee is not implied. The intent to make such exception must appear in express terms. If the grantor intends to except his right to the soil it is easy for him to do so, and, if he does not express an intention so to except it, such intention will not be implied.<sup>1</sup> A deed containing a reservation of pasturage for two cows during the lifetime of the grantor, or with a stipulation that the grantee is not to incumber or convey the land meantime, does not create an estate on condition, but conveys a fee subject to the reservation.<sup>2</sup>

A reservation of certain apple-trees in the orchard, two stalls in the southwest corner of the barn, and twelve feet square over said stalls for hay, which reservation is for the use of the grantor's mother, was held to be a reservation for the life of his mother, and not an exception.<sup>3</sup>

532. One tenant in common cannot, in a conveyance of his interest to a stranger, reserve a right of way or other easement in any particular part of the land, for this would be an attempt to create a several interest in the land held in common.<sup>4</sup> But he may do this in a conveyance to the other tenant in common, for the latter upon such conveyance has the entire property, and the reservation operates by way of an implied re-grant.<sup>5</sup> Where two tenants in common made partition of the land which they had in common, and one of them in his deed of release reserved all the wood standing on a certain lot, with the right to him, his heirs and assigns, to enter and cut the wood and take it away, the court remarked that a reservation or exception could only be out of the estate granted; and therefore that this clause could not operate by way of reservation or exception upon the undivided half of the land, which had never been in the grantor, but which was before the division, and afterwards remained in the grantee. As to the other undivided half, the clause might operate strictly as a reservation or exception. The court, however, regarded the clause as having the effect of a parol transfer of the wood then standing on the premises, as personal property, and a license to enter and cut the same, which was good until revoked, was assign-

<sup>1</sup> *Carlson v. Duluth Short Line Ry. Co.* 38 Minn. 305, 37 N. W. Rep. 341.

<sup>2</sup> *Bray v. Hussey*, 83 Me. 329, 22 Atl. Rep. 220.

<sup>3</sup> *Keeler v. Wood*, 30 Vt. 242.

<sup>4</sup> *Marshall v. Trumbull*, 28 Conn. 183, 73 Am. Dec. 667; *Adam v. Briggs Iron Co.* 7 Cush. 361.

<sup>5</sup> *Jones v. De Lassus*, 84 Mo. 541.

able without deed, and which, after it had been acted upon and the trees cut down, could not be countermanded.<sup>1</sup>

**533.** A reservation includes rights not mentioned which are indispensably necessary to the exercise of the right specifically reserved. Thus a right reserved, to flow the granted land to a certain point, includes the right to maintain a dam necessary to flow the land to such point.<sup>2</sup> Thus, also, the grant of a mill which is worked by water power carries with it the use of the water, the dam, and all things necessary for using the mill. The grant of a farm carries with it the grantor's interest in a ditch and water-right necessary to the enjoyment of the land.<sup>3</sup> An exception of mines and minerals carries with it all powers and easements necessary for working the same.<sup>4</sup> Powers of working expressly reserved do not abridge the powers which the law confers as incident to the exception.<sup>5</sup>

**534.** A way of necessity arises in case the grantor has other land which can only be reached by passing over the land conveyed. Such a way is regarded as a way created by tacit reservation or exception.<sup>6</sup> The way is annexed to the land for which it is required, and passes to the grantor's assigns as owners of such land.<sup>7</sup> "A right of way over the grantor's land may arise in several aspects, as when one man sells to another land wholly surrounded by other lands which he retains, or where the parcel sold is surrounded partly by that retained and partly by that of a stranger, over which there is no right of access. The way in such cases is a necessary incident to the grant, and with-

<sup>1</sup> *Hill v. Cutting*, 107 Mass. 596.

<sup>2</sup> *St. Anthony Falls Water Power Co. v. Minneapolis*, 41 Minn. 270, 43 N. W. Rep. 56.

<sup>3</sup> *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571; *Cave v. Crafts*, 53 Cal. 135.

<sup>4</sup> *Aspden v. Seddon*, L. R. 10 Ch. 394.

<sup>5</sup> *Cardigan v. Armitage*, 2 B. & C. 197; *Erickson v. Mich. Land & Iron Co.* 50 Mich. 604, 16 N. W. Rep. 161.

<sup>6</sup> *Holmes v. Goring*, 2 Bing. 76, 9 Moore, 166, per Best, C. J.; *Davies v. Sear*, L. R. 7 Eq. 427; *London v. Riggs*, L. R. 13 Ch. D. 798; *Brigham v. Smith*, 4 Gray, 297, 64 Am. Dec. 76; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Rightseil v. Hale*, 90 Tenn. 556, 18 S. W.

Rep. 245; *Pettingill v. Porter*, 8 Allen, 1, 85 Am. Dec. 671, 675, note; *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404, 415-421.

<sup>7</sup> *Clarke v. Cogge*, Cro. Jac. 170. "If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto, but through one of those which he sold, although he reserved not any way, yet he shall have it, as reserved unto him by the law." See, also, *Bowen v. Conner*, 6 Cush. 132; *Collins v. Prentice*, 15 Conn. 39; *Myers v. Dunn*, 49 Conn. 71; *Chappell v. New York, &c. R. Co.* 62 Conn. 195, 204, 24 Atl. Rep. 997; *Stevens v. Orr*, 69 Me. 323.

out it the grant itself would be useless. The necessity of the case raises an implication that the parties intended that the right of way would pass with the grant, though not expressed therein."<sup>1</sup> A way of necessity ceases as soon as the necessity for its use ceases.<sup>2</sup> A reservation of a way required by the grantor for the occupancy and use of his other land gives no greater right than a way of necessity, and ceases when the necessity for it ceases.<sup>3</sup> Such a right of way is limited to the purposes for which it was necessary at the date of the conveyance under which it arose, and it cannot be used for any other purposes;<sup>4</sup> and it is limited as to its duration by the continuance of the necessity for it.<sup>5</sup> Thus a way of necessity ceases if at a subsequent time the person who is entitled to it can have access to the land to which the way led by passing over his own land.<sup>6</sup>

But this general rule as to ways of necessity has no application as against the State in grants of unsettled lands.<sup>7</sup>

A way of necessity, according to most of the authorities, arises only when the necessity for it is absolute, or clearly necessary to the beneficial enjoyment of the estate conveyed or reserved;<sup>8</sup> though according to some authorities the necessity need be only reasonable and not strict.<sup>9</sup>

<sup>1</sup> *Pearne v. Coal Creek Co.* 90 Tenn. 619, 18 S. W. Rep. 402. It is also held in this case that a grant of minerals by the owner of the surface land carries with it, by implication, a right to the reasonable use and enjoyment of the surface for all necessary mining purposes. So held, also, in *Marvin v. Mining Co.* 55 N. Y. 538, 14 Am. Rep. 322.

<sup>2</sup> *Holmes v. Goring*, 2 Bing. 76, 9 Moore, 166; *Pierce v. Selleck*, 18 Conn. 321; *Collins v. Prentice*, 15 Conn. 39, 423, 38 Am. Dec. 61.

<sup>3</sup> *Viall v. Carpenter*, 14 Gray, 126.

<sup>4</sup> *London v. Riggs*, 13 Ch. D. 798. Thus, if the land to which the way of necessity led was at the date of the conveyance agricultural land, the owner can claim such a way as is suitable to the enjoyment of land in that condition; but he cannot claim a right of way suitable to the use of it as building land.

<sup>5</sup> *Holmes v. Goring*, 2 Bing. 76; *Bowen v. Conner*, 6 Cush. 132.

<sup>6</sup> *Holmes v. Goring*, 2 Bing. 76.

<sup>7</sup> *Pearne v. Coal Creek Co.* 90 Tenn. 619, 18 S. W. Rep. 402. Caldwell, J., said: "By public statutes, the State provides for the establishment and maintenance of public roads penetrating every neighborhood, and sufficiently numerous to meet the general wants of her citizens. Beyond this, and the full protection of the title conferred, she owes her grantees, as such, no duty or obligation. It would be ruinous to establish the precedent contended for, since by it every grantee, from the earliest history of the State, and those who succeed to his title, would have an implied right of way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the State."

<sup>8</sup> *Stevens v. Orr*, 69 Me. 323; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Dolliff v. Boston & M. R.* 68 Me. 173; *Buss v. Dyer*, 125 Mass. 287.

<sup>9</sup> *Goodall v. Godfrey*, 53 Vt. 219; Col-

§§ 535, 536.] EXCEPTIONS AND RESERVATIONS.

A way of necessity may be located and established by a court of equity, in such place and manner as may be necessary for the use of the party entitled to such way, without unreasonably burdening the servient estate.<sup>1</sup>

535. The construction of a reservation or exception, when this depends upon the terms used in the deed, is a matter of law to be determined by the court; but when the terms used leave the matter in doubt, and it is necessary to introduce extrinsic evidence to solve the doubt, the construction is then generally a question for the jury.<sup>2</sup> "The primary rule of construction applicable to a clause in a deed in the form of an exemption or reservation is to gather the intention of the parties from the words by reading, not simply a single clause, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered."<sup>3</sup>

III. *Of Particular Exceptions and Reservations.*

536. A reservation or exception of a house or other structure is ordinarily a reservation or exception of the grantor's title to the land on which the house or other structure stands.<sup>4</sup> An exception of a mill is an exception of the land under it, indispensable to its use, unless there is something in the conveyance indicating a different intention, just as a grant of a mill under the same circumstances is a grant of the land under it.<sup>5</sup> The particular words used in the deed, and the facts and circumstances existing at the time, must be considered in arriving at the intention of the parties. Thus, regarding the language used, a reservation "of all the buildings *on* the premises" is a reservation of the buildings only, and not of the land upon which they stand.<sup>6</sup> A reservation of a mill *now* standing secures to the grantor only

*lins v. Prentice*, 15 Conn. 39; *Phillip v. Phillips*, 48 Pa. St. 178.

<sup>1</sup> *Pearne v. Coal Creek Co.* 90 Tenn. 619, 18 S. W. Rep. 402.

<sup>2</sup> *School District v. Lynch*, 33 Conn. 330.

<sup>3</sup> *Blackman v. Striker*, 142 N. Y. 555, 37 N. E. Rep. 484; *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. Rep. 275.

<sup>4</sup> *Esty v. Currier*, 98 Mass. 500; *Allen*

*v. Scott*, 21 Pick. 25, 32 Am. Dec. 238; *Shaunon v. Pratt*, 131 Mass. 434; *Johnson v. Rayner*, 6 Gray, 107, 110; *Stockwell v. Hunter*, 11 Met. 448, 455, 45 Am. Dec. 220.

<sup>5</sup> *Moulton v. Trafton*, 64 Me. 218; *Forbush v. Lombard*, 13 Met. 109; *Esty v. Currier*, 98 Mass. 500.

<sup>6</sup> *Sanborn v. Hoyt*, 24 Me. 118.

the right to the use of the mill standing at the time of the execution of the deed.<sup>1</sup>

An exception of buildings does not include the land under the buildings when it appears to have been the intention of the parties not to include the land. The owner of land granted an undivided half thereof, "excepting and reserving all buildings and improvements, including a sawmill." At the time of the grant, a change in the condition and use of the premises was contemplated by the parties, which, when made, necessitated the abandonment of such buildings and improvements. It was held that the exception did not include any land or right to land, except the right to leave the buildings standing thereon.<sup>2</sup> An exception of a building and one rod of land around it, the building being rectangular in form, is construed to be an exception of land in a rectangular form, though small portions of the land at the corners of the lot would be more than one rod distant from the building.<sup>3</sup>

A different construction is applicable to the reservation of a right or easement in land, which may well coexist and be enjoyed by the grantor while the ownership of the fee is in the grantee; such, for instance, as a reservation of a right of way, or a privilege of a highway.<sup>4</sup> In such case the fee does not pass by implication, because it is not incidental or essential to the right or interest which is described by the deed.

**537. Of mines and minerals.** — The surface of the land may belong to one man, and the minerals beneath the surface may belong to another. Each may own a distinct part of the land.<sup>5</sup> The owner of the land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them, or in any particular strata of minerals; in which case the vendee holds a distinct and separate estate in the surface or soil, and the vendor holds a distinct and

<sup>1</sup> *Howard v. Wadsworth*, 3 Me. 471.

<sup>2</sup> *Shannon v. Pratt*, 131 Mass. 434; *Green Bay & Mississippi Canal Co. v. Hewitt*, 66 Wis. 461, 29 N. W. Rep. 237.

<sup>3</sup> *Perkins v. Aldrich*, 77 Me. 96.

<sup>4</sup> *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159.

<sup>5</sup> *Kincaid v. McGowan (Ky.)*, 4 S. W.

Rep. 802, 804; *Snoddy v. Bolen*, 122 Mo.

479, 25 S. W. Rep. 931; *Wardell v.*

*Watson*, 93 Mo. 107, 5 S. W. Rep. 605;

*Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am.

Dec. 760; *Lillibridge v. Lackawanna Coal*

*Co.* 143 Pa. St. 293, 22 Atl. Rep. 1035;

*Chartiers Coal Co. v. Mellon*, 152 Pa. St.

286, 25 Atl. Rep. 597.



separate estate in the minerals. There may be as many different owners beneath the surface as there are different strata of minerals. By this severance each estate is subject to the laws of descent, of devise, or conveyance. Each estate is as distinct property in the respective owners as is the property in a two-story house where the title to the lower story is in one person and the title to the upper story is in another person. An action of ejectment will lie in behalf of the owner of the surface to recover it; also an action will lie on behalf of the owner of the mineral estate to recover that; and the right of either owner may be barred by the statute of limitations.<sup>1</sup>

When the owner of the surface of land has granted to another the coal under his land, he has a right, apart from any reservation of it in the deed, to access through the coal to the strata underlying it.<sup>2</sup> The purchaser's estate in the coal is determinable upon the removal of the coal; and when all the coal is removed, the space it occupied reverts to the grantor by operation of law. For this purpose there is no need of any reservation in the deed. The purchaser of the coal strata has no interest in the strata underlying the coal, aside from the servitude for support, until the coal is removed.<sup>3</sup>

**538.** An exception of mines or ores is a corporeal hereditament; it is an exception of the substance of the land.<sup>4</sup> Under the English system, when livery of seisin was regarded as indispensable to a conveyance of land, inasmuch as livery could not be made of an unopened mine, the right to take ores from a mine was regarded as incorporeal. But in this country, where livery of seisin is supplied by the deed and its registration, a grant or exception of the ores of an unopened mine is regarded as a grant or exception of part of the inheritance of the land, as much as a

<sup>1</sup> *Knight v. Indiana Coal Co.* 47 Ind. 105, 110, 17 Am. Rep. 692.

<sup>2</sup> *Chartiers Coal Co. v. Mellon*, 152 Pa. St. 286, 31 W. N. C. 425.

<sup>3</sup> *Chartiers Coal Co. v. Mellon*, 152 Pa. St. 286, 31 W. N. C. 425.

<sup>4</sup> *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760; *Knight v. Indiana Coal & Iron Co.* 47 Ind. 105, 110, 17 Am. Rep. 692; *Kincaid v. McGowan* (Ky.), 4 S. W. Rep. 802, 804; *Lee v. Bumgardner*, 86

Va. 315, 10 S. E. Rep. 3. A privilege of taking ore is an incorporeal hereditament. It is not a sale or reservation of the ore, but a right to be exercised within the lands of another. It is not an exclusive right, but one to be enjoyed in common with the owner. *Johnstown Iron Co. v. Cambria Iron Co.* 32 Pa. St. 241, 72 Am. Dec. 783; *Gloninger v. Franklin Coal Co.* 55 Pa. St. 9, 93 Am. Dec. 720.

grant or exception of the surface would be.<sup>1</sup> Even an exception of one half of the profits of all coal and other minerals which may be found in the land is held to be an exception of the profits of all such coal and minerals in place.<sup>2</sup>

The right cannot be exercised to the damage of the surface, unless provision for such damage is contemplated and provided for, even if the value of the right is destroyed by this restriction.<sup>3</sup> Only such use of the surface can be made as the reservation provides for.<sup>4</sup> If the parties have provided that the grantor shall make compensation for injury done to the surface, he will not be restrained from doing such injury, or made subject to an action of ejectment, but the owner of the surface will be left to the remedy provided for.<sup>5</sup>

An exception of "all and all manner of metals and minerals, substances, coals, ores, fossils, and also all manner of compositions, combinations, and compounds of any or all the foregoing substances, and also all valuable earths, clays, stones, paints, and substances for the manufacture of paint upon or under the said tract of land," includes clay suitable for making bricks, and is not restricted to the kind of clay from which paint could be manufactured.<sup>6</sup>

<sup>1</sup> *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760; *Algonquin Coal Co. v. Northern Coal Co. (Pa.)* 29 Atl. Rep. 402. *Williams, J.*, said: "Until a severance takes place between the surface and an underlying estate, the owner's title reaches from the centre to the surface, and from the surface to the heavens; and with a grant of the land, or an acquisition of title by an adverse holding, the entire estate of the former owner passes. When a severance takes place, and the holder of a stratum of coal or other mineral records his title, or enters into possession of his sub-surface estate, he is not affected by the state of the title to, or the possession of, the surface. This was very recently said in *Plummer v. Iron Co. (Pa.)* 28 Atl. Rep. 853." And see *Kingsley v. Hillside Coal Co.* 144 Pa. St. 613, 29 W. N. C. 368.

<sup>2</sup> *Weakland v. Cunningham (Pa.)*, 7 Atl. Rep. 148.

<sup>3</sup> *Davis v. Treharne*, L. R. 6 App. Cas. 460; *Love v. Bell*, L. R. 9 App. Cas. 286;

*Hext v. Gill*, L. R. 7 Ch. 699. And see *Sholl v. German Coal Co.* 139 Ill. 21, 28 N. E. Rep. 748.

<sup>4</sup> *Dietz v. Mission Transfer Co.* 95 Cal. 92, 30 Pac. Rep. 380, 25 Pac. Rep. 423. In this case the owner of a ranch, in conveying a portion of it, reserved the oils and minerals, with the right to do whatever was necessary to obtain and transport such minerals, including the erection of proper machinery and the laying of pipes. It was held that the owner of the oils and minerals, who had also acquired the oils and minerals in the remaining portion of the ranch, was not authorized to use the land first conveyed for the purpose of pumping or storing oil found in other portions of the ranch.

<sup>5</sup> *Buccleuch v. Wakefield*, L. R. 4 H. L. 377; *Aspden v. Seddon*, L. R. 10 Ch. 394; *Erickson v. Michland Iron Co.* 50 Mich. 604, 16 N. W. Rep. 161.

<sup>6</sup> *Foster v. Runk*, 109 Pa. St. 291, 58 Am. Rep. 720.

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A reservation of "all minerals" does not include petroleum oil. Though petroleum is a mineral, such is not the general understanding, and the parties are supposed to have contracted with reference to the general meaning of the terms used.<sup>1</sup>

A reservation to the grantor, his heirs and assigns, of the right to mine a sufficient quantity of iron ore for the supply of any one furnace carries with it the right to supply any furnace which the grantor or his assigns may choose to use. The ore taken from the mine under such reservation is the absolute property of the grantor or his assigns, and he may use it or sell it, provided the quantity so used or sold does not exceed the quantity measured by the capacity of one furnace.<sup>2</sup> A reservation to the grantor, his heirs and assignees, of "a free toleration of getting coal for their own use," does not reserve all the coal beneath the surface, but merely an incorporeal right, concurrent with the mining right of the grantee, to get and carry away such coal as the grantor and his assigns may personally need for fuel.<sup>3</sup>

539. A reservation, in a deed of lands by a boom company, of a free and unobstructed passage with teams and men along the banks of a river and across the granted premises, in carrying on its "business," gives it the right to enter on the lands for the purpose of removing into the river logs that in time of high water had floated over the banks and had lodged upon the granted premises; it appearing that a very considerable portion of the company's business, when the deed was executed, consisted in making such removals.<sup>4</sup>

540. One may reserve to himself the water in a stream upon the land conveyed; or he may reserve a portion of the water,<sup>5</sup> or the use of the water at certain times specified, as, for instance, "in times of low water, when it is wanted for the grantor's mill."<sup>6</sup> He may reserve sufficient water to operate a mill,

<sup>1</sup> *Dunham v. Kirkpatrick*, 101 Pa. St. 36, 47 Am. Rep. 696; *Deer Lake Co. v. Michigan Land Co.* 89 Mich. 180, 50 N. W. Rep. 807. In the last-named case the deed contained the reservation: "Saving and reserving to the grantor herein . . . all mines and ores of metal that are now or may be hereafter found on said lands." It was held that, as the only valuable mineral found in that region at the time was iron, it was not the intention to in-

clude in the reservation marble or serpentine deposits subsequently discovered.

<sup>2</sup> *Alden's Appeal*, 93 Pa. St. 182; *Coleman v. Brooke*, 12 Phila. 503.

<sup>3</sup> *Algonquin Coal Co. v. Northern Coal Co.* (Pa.) 29 Atl. Rep. 402.

<sup>4</sup> *Bradley v. Tittabawassee Boom Co.* 82 Mich. 9, 46 N. W. Rep. 24.

<sup>5</sup> *Hurd v. Curtis*, 7 Met. 94.

<sup>6</sup> *Rood v. Johnson*, 26 Vt. 64

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such as a sawmill or gristmill, or to propel certain specified machinery; and in such case it is considered that the limitation applies particularly to the quantity of water to be used, and not to the purpose for which it may be used, and therefore the grantor is entitled to use the water for any purpose not requiring a greater power than that reserved.<sup>1</sup> A reservation of the right to divert a stream of water from its channel, to be used for certain purposes and returned to its channel, gives no right to divert or use it for other purposes, and an injunction lies to restrain its use for unauthorized purposes.<sup>2</sup>

A deed of a water power, "except sufficient to operate the mills . . . limited to one hundred horse-power," is a reservation of only so much as may be needed to operate the mills, not exceeding the amount named, and not a reservation of that amount in any event.<sup>3</sup>

The reservation of a mill and water privilege, in a grant of land bounded on or near a pond or stream, is a reservation of the right to flow the granted lands as far as necessary or convenient, or so far as it has been usual to flow them for the use of the mill.<sup>4</sup>

**541.** A reservation of a spring of water gives the grantor a right of action against the grantee for a conversion of the water by putting down an aqueduct which diverts the water continuously from the spring, and he is at least entitled to nominal damages.<sup>5</sup> A reservation of the right to take from a well, cistern, or spring "all the water which the grantee, his heirs or assigns, shall not use," means only so much of the water as he or they may not use in a reasonable enjoyment of the property conveyed. The grantor has no ground of complaint if the grantee's use of the water is a reasonable one.<sup>6</sup>

A reservation of a well of water means not only the opening which reaches down to the water, but the whole opening in the earth, with the stone laid in the well, and the water therein. The owner is entitled to cover the well with an erection not extending beyond the well.<sup>7</sup>

<sup>1</sup> *Cromwell v. Selden*, 3 N. Y. 253.  
And see *Garland v. Hodsdon*, 46 Me. 511.

<sup>2</sup> *Hall v. Ionia*, 38 Mich. 493.

<sup>3</sup> *Moore v. Wilder*, 66 Vt. 33, 28 Atl. Rep. 320.

<sup>4</sup> *Pettee v. Hawes*, 13 Pick. 323; *French v. Carhart*, 1 N. Y. 96.

<sup>5</sup> *Peck v. Clark*, 142 Mass. 436, 8 N. E. Rep. 335.

<sup>6</sup> *Wilcox v. Kendall*, 63 N. H. 609, 3 Atl. Rep. 633.

<sup>7</sup> *Mixer v. Reed*, 25 Vt. 254.

A reservation of a right to take water from a well imposes upon the grantee no obligation to keep the well in repair, or to preserve its existence.<sup>1</sup> A reservation of "the use of a well" does not give the grantor the exclusive use of it if the water is ample for the use of both the grantor and the grantee.<sup>2</sup>

542. An exception or reservation of an existing highway passing through the granted land is usually for the purpose of relieving the grantor from his covenant against incumbrances, and the fee in the land so excepted passes to the grantee.<sup>3</sup> The grantor might make it plain that he retained the fee in the highway in himself; and, on the other hand, the exception may be made in terms that make it certain that the grantor did not intend to retain the fee in himself, but only to guard against any claim that might be made under his covenants. This is the case where the exception was made in a clause which stated the quantity of the land exclusive of the county road, which the grantor reserved.<sup>4</sup>

A deed conveying land in a town, but "reserving streets and alleys according to recorded plat of the town," passes the fee in such streets, when such fee was at the time held by the grantor, subject to the easement of the public therein. The language of the deed could only be held to withhold the fee of the streets and alleys from its operation, upon the hypothesis that the fee of the streets and alleys is vested in the municipality, for that is the measure of what is withheld from the operation of the deed; and therefore, if an easement only in the soil of the streets and alleys is vested in the municipality for the use of the public, that only is withheld from the operation of the deed.<sup>5</sup>

<sup>1</sup> Ballard v. Butler, 30 Me. 94.

<sup>2</sup> Barnes v. Burt, 38 Conn. 541.

<sup>3</sup> Day v. Philbrook, 85 Me. 90, 26 Atl. Rep. 999. The grantor's farm was divided into two parcels by a town road. He sold the northerly parcel, bounding it by such road, and afterwards sold the southerly parcel, making the road the northerly line. In the first deed the grantor at the end of the description added the following words: "Reserving the town road leading through the farm." It was held that the fee of the road was not reserved, but only its use as an incumbrance. The court, Emery, J., said: "As to this contention, it seems clear to us that

Coombs did not intend by those words to except from his conveyance of the whole farm the soil or land under this town road. He did not intend to interpose a barrier between different parts of the farm. We cannot see any motive. It is evident, we think, that he merely intended to exclude from his covenants of warranty, etc., the incumbrance of the town road. We think the words used have no effect, and that, in spite of them, the fee in the strip occupied by the road passed to Rowell, and hence not to the plaintiff, who does not claim under Rowell."

<sup>4</sup> Kuhn v. Farnsworth, 69 Me. 404.

<sup>5</sup> Gould v. Howe, 131 Ill. 490, 23 N. E. Rep. 602.

An exception of so much of the land conveyed as has been taken for a public road is an exception of the land covered by the road, the fee remaining in the grantor.<sup>1</sup> But ordinarily an exception of a road or highway laid out through the land is an exception of the public easement only, the fee of the land passing to the grantee.<sup>2</sup> Even an exception of a street, defined in location and width, to be laid out for the use of the public, in lieu of an existing street having a different location, is regarded as a reservation of the easement of the street, the title to which passed to the grantee.<sup>3</sup>

Under a reservation of a strip on one side of the tract conveyed "for a public street," the fee passes to the grantee. If the grantor intended to except the fee of the street, his intention was not expressed by reserving the strip for a public street and for nothing else.<sup>4</sup>

A reservation of a road through the land conveyed for the use of the parties to the deed, their heirs and assigns, to enable the grantor to reach other lands owned by him from a highway, is

<sup>1</sup> *Munn v. Worrall*, 53 N. Y. 44, 18 Am. Rep. 470; *In re Board of Street Opening*, 68 Hun, 562, 22 N. Y. Supp. 1021, *Rushton v. Hallett*, 8 Utah, 277, 30 Pac. Rep. 1014.

A deed, after describing land, provided: "It being understood that the public thoroughfare formerly existing along the edge of the river at this point is not intended to be conveyed, . . . the city . . . having the right to open said thoroughfare when it sees fit." It was held an absolute reservation of the land upon which the street had formerly been, and not a mere right of use to the public. *Umscheid v. Scholz*, 84 Tex. 265, 16 S. W. Rep. 1065.

A contract to convey land in a city specified two parcels between which was a strip that had been surveyed as a street, but had never been conveyed to the city as a street or otherwise. The deed given pursuant to the contract described the land as one parcel, and included the strip, but excepted "the street heretofore deeded to said city." Held, that the exception excluded the strip from the operation of the deed, since the deed was in the except-

ing clause that the strip was "deeded" to the city was merely descriptive of the strip. *Rushton v. Hallett*, 8 Utah, 277, 30 Pac. Rep. 1014.

<sup>2</sup> *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Leavitt v. Towle*, 8 N. H. 96; *Richardson v. Palmer*, 38 N. H. 212; *Tuttle v. Walker*, 46 Me. 280; *Cottle v. Young*, 59 Me. 105; *Hays v. Askew*, 5 Jones, 63; *Long v. Fewer*, 53 Minn. 156, 54 N. W. Rep. 1071. In a deed of a lot of land fronting on the river, the following provision was held to amount to an exception: "It being understood that the public thoroughfare formerly existing along the edge of the river at this point is not intended to be conveyed by these presents, the corporation of the city of Bexar having the right to open said thoroughfare when it sees fit." The grantee took no title in such land. *Umscheid v. Scholz*, 84 Tex. 265, 16 S. W. Rep. 1065.

<sup>3</sup> *Cincinnati v. Newell*, 7 Ohio St. 37; *Dunn v. Sanford*, 51 Conn. 443.

<sup>4</sup> *Elliott v. Small*, 35 Minn. 396, 29 N. W. Rep. 158; *Carlson v. Duluth Short Line Ry. Co.* 38 Minn. 305, 37 N. W. Rep. 341; *Hays v. Askew*, 5 Jones, 63.

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presumed, in the absence of a clear indication in the deed to the contrary, to be merely a reservation of the use of the road and not of the fee therein.<sup>1</sup>

543. In a deed by a city, an exception of streets is an exception of the fee of the streets, in case the city generally owns the fee of the streets. Thus, an exception of so much of the land described as may be required for streets laid down upon a map annexed to the deed is an exception of the fee of such streets, and not merely a reservation of an easement in the streets. The terms of the deed itself demand such a construction, which may be enforced by the circumstances of the particular case; as where it appears to be the settled policy of the city to own in fee its streets. "As the city, then, owned in fee the land upon which all, or nearly all, its streets were constructed, and as it was the settled policy of the city to condemn or purchase land in fee for its streets, it cannot be supposed that it meant to depart from the usual course in this grant, and actually convey away the fee of the land needed for streets, and to reserve to itself only street easements therein."<sup>2</sup>

544. Parol evidence is admissible to explain the purpose and extent of a reservation of a right of way, when these are left in doubt by the deed. Thus, where a right of way, as previously used, is reserved to the grantor, his heirs and assigns, the boundary of the tract conveyed being in part along the road, it may be shown that the grantor had other lands bordering on the road, and that the termini of the road were in his lands; and upon such evidence the reservation will be held to be a right appurtenant to the land of the grantor not conveyed, and will pass to a subsequent purchaser of that land.<sup>3</sup> It is admissible to ascertain the circumstances existing at the time the deed was executed, though evidence of what the parties said or agreed at that time is inadmissible.<sup>4</sup>

A reservation of a right of way to the grantor's other land, "as usually occupied," gives him a right of way for all purposes connected with the customary use of such land. If such land has

<sup>1</sup> *The Redemptorist v. Wenig* (Md.), Y. 592, 96 N. Y. 477; *Coffin v. Scott*, 102 29 Atl. Rep. 667. N. Y. 730.

<sup>2</sup> *Mayor v. Law*, 125 N. Y. 380, 390, 26 N. E. Rep. 471; *Langdon v. Mayor*, 93 S. E. Rep. 591.

*N. Y.* 129, 149; *Duryea v. Mayor*, 62 N. <sup>4</sup> *Swick v. Sears*, 1 Hill (N. Y.), 17.

usually been used for the production of hay and other crops, though the grantor had never carted hay across the granted premises, he has the right to use the reserved way for this purpose, and to do so he may cut a limb from an overhanging tree.<sup>1</sup> But a reservation of a right to pass over an old pathway to a lot described confers no right to pass farther upon the same pathway to another lot.<sup>2</sup>

The reservation of the right of ingress and egress, on foot and with teams, to and from the land on one side of that conveyed, reserves a right of way reasonably wide for the passage of teams.<sup>3</sup>

**545.** Under a reservation of a right to open a highway across the grantee's land, the grantor may exercise his own judgment as to its location, if there are no restrictions as to its location, or after observing such restrictions as are set out in the deed. The grantee cannot demand that a jury shall pass upon the reasonableness of the exercise of the right in respect to the location of highway, having in view all the surrounding circumstances and the situation of the land. The grantor has the right under such reservation to exercise his own judgment, provided he acts fairly and not wantonly.<sup>4</sup>

**546.** A passageway reserved by the grantor may be covered over with a building by the grantee, provided he does not place any part of it upon the passageway, and leaves it of convenient height, of the stipulated width, and with light sufficient for the purpose for which the passageway was reserved. The owner of the land has the entire beneficial use of it, subject only to the easement.<sup>5</sup> This is a right to use the surface of the soil for the purpose of passing and repassing with sufficient light. If the dimensions of the way are not expressed, but the object is expressed, the dimensions must be such as are reasonably sufficient for such object.<sup>6</sup>

**547.** A reservation of all gravel on the granted land gives the right to remove all deposits of which the greater part is gravel, or such as are commonly known as gravel, though they

<sup>1</sup> *Sargent v. Hubbard*, 102 Mass. 380.

<sup>2</sup> *Farley v. Bryant*, 32 Me. 474.

<sup>3</sup> *Gleason v. Burroughs* (Wis.), 63 N. W. Rep. 292.

<sup>4</sup> *Hart v. Connor*, 25 Conn. 331.

<sup>5</sup> *Gerrish v. Shattuck*, 132 Mass. 235;

*Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100.

<sup>6</sup> *Atkins v. Bordman*, 2 Met. 457, 467, 37 Am. Dec. 100, per Shaw, C. J.



contain a mixture of sand; but it gives no right to reserve sand alone.<sup>1</sup> In a deed by a town of the "sand and gravel" on a beach "for making and repairing the highways," evidence is not admissible that material afterwards taken from the beach by the town was universally known in the town as gravel, and that it was not known or called by any other name; but evidence is admissible that such material was the same that the town had always used for making and repairing highways.<sup>2</sup>

IV. *Whether a Reservation is Personal or Appurtenant to the Land.*

548. A reservation by the grantor of a right or interest forever, gives him only a life estate. As in a grant, so in a reservation to create an estate of inheritance, the necessary word of limitation, the word "heirs," must be used, and in general its place cannot be supplied by any other words of perpetuity.<sup>3</sup> A reservation operates by way of an implied grant. It is either a right personal to the grantor, or is appurtenant to his lands, for the benefit of which it was reserved. In the latter case it cannot be separated from or transferred independently of the land to which it adheres. If it is a personal privilege, it is not assignable, and does not pass to the grantor's heirs or personal representatives. It is a privilege strictly personal to the grantor.<sup>4</sup>

A reservation of a right of way to a barn standing on a dwelling-house lot belonging to the grantor makes the right of way appurtenant to the dwelling-house lot for such purposes as a way to a barn might properly be used, and it is not lost by the destruction of the barn standing thereon at the time of the reservation.<sup>5</sup>

<sup>1</sup> Noble v. Ill. Cent. R. R. Co. 111 Ill. 437.

<sup>2</sup> Brown v. Brown, 8 Met. 573.

<sup>3</sup> Ashcroft v. Eastern R. R. Co. 126 Mass. 196, 30 Am. Rep. 672; Bean v. French, 140 Mass. 229, 3 N. E. Rep. 206; Curtis v. Gardner, 13 Met. 457; Jamaica Pond Aqueduct v. Chandler, 9 Allen, 159; Bridger v. Pierson, 1 Lans. 481; Hornbeck v. Westbrook, 9 Johns. 73; Knotts v. Hydrick, 12 Rich. 314; Koelle v. Knecht, 99 Ill. 396. But where one conveyed a part of a larger tract, "reserving the free and common use and privilege of the

wharf at the westerly corner of the lot, to be improved and kept in repair at the joint expense of the said parties, their heirs and assigns," it was held that, the obligation to improve and repair being imposed on heirs and assigns, the right reserved must by implication have the same duration and transmissible quality. Perry v. Pennsylvania R. Co. 55 N. J. L. 178, 26 Atl. Rep. 829, 832.

<sup>4</sup> Kister v. Reeser, 98 Pa. St. 1, 42 Am. Rep. 608.

<sup>5</sup> Bangs v. Parker, 71 Me. 458.

A reservation by the grantor to himself *or* his heirs may be construed to be a reservation to himself *and* his heirs.<sup>1</sup>

An exception need not be made with words of limitation, because the estate or rights excepted remain the grantor's property, and inure to the benefit of his heirs and assigns, just as any of his property does.<sup>2</sup>

549. There is a distinction between easements and servitudes that are personal and those that are real. The former exist in favor of a particular person, and upon the sale of his land the personal right does not go with it.<sup>3</sup> But if the right attaches to the land, it passes by a conveyance of the land, even without the use of any words descriptive of the right. A reservation of a right appurtenant to other land of the grantor passes with the land to which it is appurtenant, without any words of limitation, to the heirs and assigns of the grantor.<sup>4</sup>

A reservation will not be regarded as personal unless the intention that it shall be such appears from the language used in the deed, or from the nature of the subject-matter. Thus the reservation of the use and occupancy of the granted land for a stated period, if the grantor should choose to do so for that length of time, but, if he should leave the possession and occupancy of the premises before the expiration of such period, then the reservation should determine, is not a limitation personal in its nature, and is not determined in part or in whole by the grantor's leasing a portion of the property reserved.<sup>5</sup>

In a conveyance of a mill with a dam and a slip made for driving logs, a reservation of the right to drive logs through the slip free of toll is a personal right not assignable.<sup>6</sup>

In a conveyance by a parent to his daughter, a reservation of a house upon the granted property gives the grantor no right to turn his daughter out, and to put a stranger in possession of the property; he has no such possessory right in it as is the subject of conveyance.<sup>7</sup>

550. A permanent easement in favor of the grantor's other

<sup>1</sup> White v. Crawford, 10 Mass. 183.

<sup>2</sup> Emerson v. Mooney, 50 N. H. 315.

<sup>3</sup> Cave v. Crafts, 53 Cal. 135; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571.

<sup>4</sup> Engel v. Ayer, 85 Me. 448, 27 Atl. Rep. 352; Winthrop v. Fairbanks, 41 Me. 307; Smith v. Ladd, 41 Me. 314; Bowen

v. Conner, 6 Cush. 132; Borst v. Emple, 5 N. Y. 33.

<sup>5</sup> Cooney v. Hays, 40 Vt. 478, 94 Am. Dec. 425.

<sup>6</sup> Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525.

<sup>7</sup> Fisher v. Nelson, 8 Mo. App. 90.

land may be created without words of limitation. In a recent case in Connecticut, the grantors, in selling a right of way across their land to a railroad company, reserved the right of crossing, and provided that the company should lay the railroad track on a level with the ground of the grantor's wharf beyond the track. The reservation was not made to the grantors and their heirs, and it was contended that the right to cross lasted only during the lives of the grantors. The court declared this contention not well founded, and said: "If the deed had been silent as to the right to cross, the law would have given an adequate 'way of necessity' in favor of the owners of the premises. In the absence of any relinquishment of such a way of necessity in the deed, it is hard to believe that the parties intended by an express reservation, made under these circumstances, to give to the grantors or allow them to retain a less extensive right than the law would have given if nothing had been said in the deed about the right to cross. Then, too, the right to cross was, in a certain sense, a right existing in the grantors at the date of the deed. It was a part of their full dominion over the strip about to be conveyed by the deed, and not a right to be in effect conferred upon them by the grantees. It was something which the 'reservation' in effect 'excepted' out of the operation of the grant. Hence it is quite reasonable to conclude that the stipulation as to the right of way was intended by both parties to give a right not temporary and personal, but permanent, and for the benefit not so much of the grantors as of the premises they continued to hold. In such cases we think the rule is well settled that a permanent easement in favor of the retained land may be made without words of limitation."<sup>1</sup>

In another case, where a reservation was made of the right to draw water for the use of a mill owned by the grantor, it was contended that the agreement was only a license to the grantor to draw water for so long a time as he should own the mill. The court, however, said: "This claim is in conflict with all the facts of the case. The right to the water is reserved without limitation as to time. It was made for the benefit of the mill below, and manifestly was designed to be appurtenant to it. It would not only be beneficial so long as the grantor should own the mill, but would enhance its value to some extent when sold."<sup>2</sup>

<sup>1</sup> Chappell v. New York, &c. R. Co. 62 Conn. 195, 203, 24 Atl. Rep. 997.

<sup>2</sup> Randall v. Latham, 36 Conn. 48, 53.

In a deed of a mill upon a stream upon which the grantors had another mill, they reserved the right to use water and convey it from the dam "for the necessary accommodation and use of the old shop" which the grantor still owned in fee simple. The reservation was made without words of inheritance, but it was held that the grantors had an assignable interest in the privilege reserved. In determining what the parties intended by the reservation, the court said it was proper to take into consideration the condition of the property and the circumstances of the parties in relation thereto, and to inquire for what purpose the reservation was made. "It was 'for the necessary accommodation and use of the old shop.' Of this they were the owners in fee simple; and can it be supposed that they meant to limit the use of the water, without which the establishment was of no value, to their own personal occupancy? And can it be believed that such was the intention of the parties to this deed? The idea is opposed to every presumption and to all probability. Are we, then, prevented, by any rigid rule of construction, from giving effect to the intention of the parties? We know of none; and we think this part of the case entirely free from doubt."<sup>1</sup>

**551.** A reservation of a right in the nature of a servitude in the land granted, for the benefit of the grantor's other land, is not a bare license to the grantor himself while he may own the land, but the right reserved is a permanent right for the benefit of the principal estate, whoever may be the owner. Such right is manifestly designed to be appurtenant to the grantor's estate, and to constitute a part of it.<sup>2</sup> But a subsequent vendee of the party making the reservation can exercise no greater right than that reserved.<sup>3</sup>

A reservation of an easement is never presumed to be for the

<sup>1</sup> *Kennedy v. Scovil*, 12 Conn. 317, 132; *Cowdrey v. Colburn*, 7 Allen, 9, 13; 326.

<sup>2</sup> *Randall v. Latham*, 36 Conn. 48; *Smith v. Higbee*, 12 Vt. 113; *Fuller v. Chappell v. New York, &c. R. Co.* 62 Arms, 45 Vt. 400; *Borst v. Emple*, 5 N. Conn. 195, 24 Atl. Rep. 997; *Tinker v. Y.* 33; *Barrow v. Richard*, 8 Paige, 351, Forbes, 136 Ill. 221. 26 N. E. Rep. 503; 35 Am. Dec. 713; *Rexford v. Marquis*, 7 Shelby v. Chicago, &c. R. Co. 143 Ill. Lans. 249; *Baker v. Mott*, 78 Hun, 141, 385, 32 N. E. Rep. 438; *Mendell v. De- 28 N. Y. Supp. 968; Herrick v. Marshall,* lano, 7 Met. 176; *Dyer v. Sanford*, 9 Met. 66 Me. 435; *Karmuller v. Krotz*, 18 Iowa, 395, 43 Am. Dec. 399; *Brown v. This-* 352.

*sell*, 6 Cush. 254; *Dennis v. Wilson*, 107 <sup>3</sup> *Palfrey v. Foster*, 47 La. Ann. —, 17 Mass. 591; *Bowen v. Conner*, 6 Cush. So. Rep. 425.

personal use of the grantor, if it can be fairly construed to be appurtenant to other land of the grantor.<sup>1</sup> Thus, where the owner of land conveyed it, excepting and reserving, without words of inheritance, a right of way extending from the highway along the line of division between the land sold and the grantor's other land, it was held that the right was appurtenant to the grantor's other land. Mr. Justice Wells, delivering judgment, said: "If the nature of the right, as appurtenant or in gross, depended upon its duration or inheritable quality, it might be necessary to consider whether the clause in this deed is one of exception, carving the way out of the premises described in the deed, and retaining it in the grantor as a part of his former estate, or whether it created a new right in the land of the grantee by way of reservation or implied grant. But we do not think it is so dependent. Even if it were conceded that the clause in question is to be construed as one of reservation strictly, and that, for want of words of inheritance, the right is limited to the life of the grantor, it does not follow that it is a mere personal right not assignable. Its character must be determined by the purposes for which the way was intended to be used. Those purposes being ascertained from the terms of the deed, aided, if necessary, by the situation of the property and the surrounding circumstances,<sup>2</sup> the deed is to be construed accordingly."<sup>3</sup>

Where upon a division between tenants in common one grantor reserved a right of way over the land he conveyed for the benefit of the land he retained, the reservation created an easement which ran with the land.<sup>4</sup>

552. Thus, too, if the grantor reserves the right to the free use of light and air of the land conveyed for the benefit of his other land, the reservation will be regarded as appurtenant to the grantor's land, and the benefit of it will pass with the land to his heirs and assigns, though they are not mentioned in the reservation. "The tendency of the adjudications on this subject is properly to disregard technical distinction between reservation and exception, and construe the language used so as to effectuate the intention of the parties. A covenant or stipulation inserted in a deed poll binds the grantee, his heirs and assigns, where such

<sup>1</sup> *Smith v. Porter*, 10 Gray, 66; *Dennis v. Wilson*, 107 Mass. 591.

<sup>3</sup> *Dennis v. Wilson*, 107 Mass. 591, 593.

<sup>2</sup> *Green v. Putnam*, 8 Cush. 21.

<sup>4</sup> *Mendell v. Delano*, 7 Met. 176.

stipulation relates to the premises conveyed. The easement in such case may be acquired by a clause of reservation."<sup>1</sup>

553. In a reservation of a right to take profit out of the soil, no words of perpetuity are necessary to create an estate in fee simple in such right.<sup>2</sup> Thus a reservation of the right to maintain a boom on Penobscot River, "on the flats between high and low water marks of said river, along the premises hereby conveyed, either to use myself or to let or sell to other persons," was held to be a right of profit in land which would pass to the grantor's heirs upon his death, and might be assigned by them.<sup>3</sup>

In a conveyance of land to a railroad company for the purposes of the road, the grantor reserved "the right to use any portion of the land not required by the said company, he yielding possession of the same whenever the land shall be needed by the company." It was held that the failure of the company to occupy any part of the land for forty years did not affect its rights in the land. The right of the grantor passed by his will to his devisee.<sup>4</sup>

In a deed of a right of way to a railroad company, a provision that "the said grantor and his family shall have and enjoy the right of free passage" in its cars over the road, "so long as the land and appurtenances hereinbefore described shall continue to

<sup>1</sup> *Hagerty v. Lee*, 54 N. J. L. 580, 583, 25 Atl. Rep. 319, per Van Syckel, J., citing *Finley v. Simpson*, 22 N. J. L. 311; *Cooper v. Louanstein*, 37 N. J. Eq. 284; *Newhoff v. Mayo*, 48 N. J. Eq. 619, 23 Atl. Rep. 265; *Rosenkrans v. Snover*, 19 N. J. Eq. 420. And the grantee in a deed, and those claiming under him, cannot deny the binding authority of a reservation in a deed. *Sheppard v. Hunt*, 4 N. J. Eq. 277; *Fitzgerald v. Faunce*, 46 N. J. L. 536, 598. Vice-Chancellor Van Fleet, in *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. Rep. 190, expresses in substance this view of the rule: When by the construction of a grant it appears that it was the intention of the parties to create or reserve a right in the nature of a servitude in the land granted, for the benefit of other land owned by the grantor, no matter in what form such intention may be expressed, such right, if not against public policy, will be held to be appurtenant to the land

of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass, with the lands, to all subsequent grantees.

<sup>2</sup> *Engel v. Ayer*, 85 Me. 448, 27 Atl. Rep. 352.

<sup>3</sup> *Engel v. Ayer*, 85 Me. 448, 27 Atl. Rep. 352. The right reserved was "not a mere easement properly so called, but a profitable interest in the land itself which passed to his [the grantor's] children by the devise, and was by them granted to the defendant. And it is a satisfaction to observe that this conclusion is not only in harmony with the authorities, but it effectuates the intention of the parties clearly manifested by the language of the exception examined in the light of the attending facts." Per Whitehouse, J.

<sup>4</sup> *King v. Norfolk & W. R. Co.* 90 Va. 210, 17 S. E. Rep. 868.

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be used" for railroad purposes under its charter, does not entitle a descendant of the grantor who is not a member of the grantor's household to a free pass over the road as a member of his family. The words, "so long as the land . . . shall continue to be used as a railroad . . . under the charter of said corporation," do not imply perpetual succession. They are words of limitation of the grant, and not words extending the meaning of the word 'family.'"<sup>1</sup>

554. In those States in which words of inheritance are not necessary to a transfer in fee, such words are not necessary in a reservation in order to give the grantor an assignable interest. Thus, a reservation of a profit or interest in the soil, *profit a prendre in alieno solo*, being assignable at common law with words of inheritance, is assignable without such words in such States. "There is certainly no reason why an absolute estate should pass without words of inheritance, and the reservation of a right of *profit a prendre* should not."<sup>2</sup>

555. When a reservation, so called, is in fact an exception, no words of inheritance are necessary in order that the rights reserved or excepted may go to the heirs or assigns of the grantor.<sup>3</sup> A reservation of a right of way over the granted premises in suitable places, to other lands of the grantor particularly mentioned, confers on the grantor the benefit of an exception in favor of the grantor, his heirs and assigns, as the occupants of such other lands, the privilege reserved being appurtenant to such lands.<sup>4</sup>

A land-owner conveyed to a railroad company a strip of land already appropriated by it for its location, "reserving the pass-way at grade over said railroad where now made." The strip divided the land of such owner into tracts containing four and thirty-three acres respectively. The former adjoined a highway,

<sup>1</sup> Dodge v. Boston & P. R. Co. 154 Mass. 299, 28 N. E. Rep. 243.

<sup>2</sup> Painter v. Pasadena, &c. Co. 91 Cal. 74, 82, 27 Pac. Rep. 539.

<sup>3</sup> Engel v. Ayer, 85 Me. 448, 27 Atl. Rep. 352; Randall v. Randall, 59 Me. 338; Winthrop v. Fairbanks, 41 Me. 307; Smith v. Ladd, 41 Me. 314; Mendell v. Delano, 7 Met. 176; Brown v. Conner, 6 Cush. 132; White v. Crawford, 10 Mass. 183; Stockbridge Iron Co. v. Hudson

Iron Co. 107 Mass. 290; Emerson v. Mooney, 50 N. H. 315; Whitaker v. Brown, 46 Pa. St. 197; Keeler v. Wood, 30 Vt. 242; Painter v. Pasadena, &c. Co. 91 Cal. 74, 27 Pac. Rep. 539; Chappell v. New York, &c. R. Co. 62 Conn. 195, 208, 24 Atl. Rep. 997.

<sup>4</sup> Winthrop v. Fairbanks, 41 Me. 307. See, however, Smith v. Higbee, 12 Vt. 113.

but the only lawful access to the other was by the passway over the smaller tract and the railroad, which passway was in use before the construction of the railroad, and continued to be used without objection for nearly forty years thereafter. It was held that it was the intention of the parties to annex the use of the passway as a perpetual right to the larger tract.<sup>1</sup>

556. When the purpose of an exception or reservation is specified, the use of property or right is limited to that purpose. Thus, under a clause in a deed "excepting and reserving one half acre of land, being the old family graveyard of the grantor, together with a right of way" to the same, the grantor is restricted to the use of the graveyard for a place of burial of the grantor's family only, and he cannot license others to use the right of way.<sup>2</sup> A reservation of a lot of land, to be used as a graveyard for the grantor and his family, is a privilege personal to the grantor and his family which cannot be assigned to a stranger.<sup>3</sup>

Where a railroad company reserved a strip of land to be used for a right of way or other railroad purposes, in case the line of said railroad or any of its branches should be located on or over the granted land, another railroad company is not entitled to the benefit of such reservation for a right of way for a branch road, though in fact such branch road is constructed by the company that granted the land and reserved the right of way, this company not being authorized by its charter to construct such branch.<sup>4</sup>

557. When a determinable fee. — An exception of a saw-mill, with land enough about it to carry on the lumbering business, and a right of way to the same, so long as the grantor "occupies said privilege with mills," constitutes a determinable or qualified fee which can be assigned. The duration of the estate is not limited to the personal occupancy of the mill by the

<sup>1</sup> *White v. New York & N. E. R. Co.* (Iowa), 56 N. W. Rep. 515; *Chappell v. 156 Mass. 181*, 30 N. E. Rep. 612. Per Morton, J.: "As already stated, the only reasonable construction in the present case would seem to be that it was the intention of the parties to annex the right of passing to the larger tract as a perpetual easement, and, the language of the deed being sufficient for that purpose, it follows that the passageway is to be so regarded." See, also, *Bonson v. Jones*

*New York, &c. R. Co.* 62 Conn. 195, 203, 24 Atl. Rep. 997.

<sup>2</sup> *Brown v. Anderson*, 88 Ky. 577, 11 S. W. Rep. 607. See *Herbert v. Pue*, 72 Md. 307, 20 Atl. Rep. 182.

<sup>3</sup> *Pearson v. Hartman*, 100 Pa. St. 84.

<sup>4</sup> *Biles v. Tacoma, &c. R. Co.* 5 Wash. 509, 32 Pac. Rep. 211. And see *Dunstan v. Northern Pac. R. Co.* 2 N. D. 46, 49 N. W. Rep. 426.



grantor, but is limited to the existence of the mill. The test of the limitation is the purpose for which the estate may be occupied.<sup>1</sup> A reservation of a cider-mill, "so long as the same shall stand" on the land, gives a title in the building and the land under it so long as the building shall stand on the land, though it be used for a different purpose.<sup>2</sup>

558. A reservation for a limited time of an easement, such as the right of mining ores, of quarrying marble, or of taking stone from the land, is not a mere personal privilege to the grantor, but a right and interest in the use of the land for the time designated, which he may assign to another.<sup>3</sup> A reservation of the use of a quarry until the expiration of a lease of the same, which the grantor had previously made for the term of ten years, is a reservation till the end of the ten years, although the lease be cancelled with the consent of the parties to it within that time. The reservation inures to the use of the grantor as well as his lessee.<sup>4</sup>

559. A reservation of the right to cut and remove trees within a definite time, is only a reservation of the right to enter and cut the trees within such time, and not an exception of the trees out of the grant.<sup>5</sup> In cases where the trees themselves are reserved, the property in them remains in the grantor, with the right to so much of the soil as is necessary to sustain them during the time within which the grantor may enter upon the land and remove them.<sup>6</sup> The reservation is an exception, and the stipulation that the trees shall be cut and removed within a given time does not make the exception conditional on such removal. The grantor owning the trees may enter the grantee's land and remove them after the stipulated time has expired; but

<sup>1</sup> *Moulton v. Trafton*, 64 Me. 218; *Farnsworth v. Perry*, 83 Me. 447, 22 Atl. Rep. 373, where the reservation was of a store upon the land granted, "with the privilege of remaining as long as the store stands."

<sup>2</sup> *Esty v. Currier*, 98 Mass. 500.

<sup>3</sup> *Munn v. Stone*, 4 Cush. 146; *Farnum v. Platt*, 8 Pick. 339, 19 Am. Dec. 330.

<sup>4</sup> *Farnum v. Platt*, 8 Pick. 339, 19 Am. Dec. 330.

<sup>5</sup> *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81.

<sup>6</sup> *Goodwin v. Hubbard*, 47 Me. 595; *Howard v. Lincoln*, 13 Me. 122; *Knotts v. Hydrick*, 12 Rich. 314. "A reservation of 'all the standing wood' upon a lot, to be removed at any time within three years, includes trees suitable for timber as well as trees suitable for fuel; and if there is nothing in the deed to show that the term 'standing wood' is used in a more limited sense, parol evidence is not admissible to restrict the meaning of these words." *Strout v. Harper*, 72 Me. 270.

he will be liable for damages in breaking and entering, though such damages would not include the value of the trees, for these are already the property of the grantor.<sup>1</sup> The grantor is liable in damages for leaving the timber on the land longer than the stipulated time, and for all damages done to the grantee's land by its removal after such period; but the grantee cannot claim the timber already cut not then removed, or the value of it as part of the damages. The timber, having been severed from the land, became personal property, and the title was fully vested in the grantor.<sup>2</sup>

When wood and timber are reserved without fixing any definite time for their removal, a reasonable time is implied.<sup>3</sup>

No interest remains in the grantor in the land or in the trees which are parcel of it after the time limited in the reservation, in case the property in the trees is reserved conditionally upon their removal within a limited period, or within a reasonable time.<sup>4</sup> If a definite period, say ten years, is reached, during which the trees are allowed to stand and grow without payment, and further time beyond such period is allowed on the payment of a stipulated yearly rent, the reservation is lost by the grantor's failure to elect to have the trees stand and grow for such further time by making payment or offer of payment of the rent named. The reservation will expire by its own limitation with the ten years, nothing having been done to keep it alive beyond that time.<sup>5</sup>

**560.** A reservation may be released by the grantor's subsequent deed which grants and warrants the property without reservation or exception.<sup>6</sup> If the reservation be of an interest in the land, such as an easement in it, it cannot be extinguished or

<sup>1</sup> *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193; *Plumer v. Prescott*, 43 N. H. 277; *Hoit v. Stratton Mills*, 54 N. H. 109. See, however, *Knott v. Hydrick*, 12 Rich. 314.

<sup>2</sup> *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193; *Plumer v. Prescott*, 43 N. H. 277.

<sup>3</sup> *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455; *Gilmore v. Wilbur*, 12 Pick. 120, 22 Am. Dec. 410; *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119;

*Knott v. Hydrick*, 12 Rich. 314. See *Putnam v. Tuttle*, 10 Gray, 48.

<sup>4</sup> *Plumer v. Prescott*, 43 N. H. 277; *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Judevine v. Goodrich*, 35 Vt. 19. And see *Boisaubin v. Reed*, 2 Keyes, 323, 1 Abb. Dec. 161; *McIntyre v. Barnard*, 1 Sandf. Ch. 52; *Warren v. Leland*, 2 Barb. 613, 622; *Pease v. Gibson*, 6 Me. 81.

<sup>5</sup> *Perkins v. Stockwell*, 131 Mass. 529.

<sup>6</sup> *Clifton v. Jackson Iron Co.* 74 Mich. 183, 41 N. W. Rep. 891.

renounced by a parol agreement. But an abandonment of an easement reserved may be shown by parol evidence. A license by the owner of the dominant estate to the owner of the servient estate, to obstruct an easement, is not revocable after it is executed, and may operate as an abandonment of the easement to the extent of such license.<sup>1</sup>

<sup>1</sup> *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399.

## CHAPTER XX.

### THE HABENDUM, OR THE ESTATES CREATED.

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| <p><b>I.</b> The office and effect of the habendum clause, 561-570.</p> <p><b>II.</b> The naming of the grantee in the habendum clause, 571-574.</p> | <p><b>III.</b> The word "heirs" essential at common law to create an estate in fee, 575-600.</p> <p><b>IV.</b> The rule in Shelley's Case, 601-610.</p> <p><b>V.</b> Estates tail, 611-618.</p> |
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#### *I. The Office and Effect of the Habendum Clause.*

**561.** An estate in fee is an estate of inheritance. A fee simple is the greatest interest and the most absolute in the rights conferred that one can have in real property. The word "fee" means inheritance, and, as Lord Coke says, "'simple' is added, for that it is descendible to the heirs generally, that is, simply, without restraint to the heirs of the body, or the like."<sup>1</sup> The word "absolute" added does not impart anything to the legal effect of the term "fee" or "fee simple."<sup>2</sup>

**562.** The office of the habendum is to define the grantee's estate. "It is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use."<sup>3</sup> The essential words of the clause are "to have and to hold." The latter word originally served to indicate that the property was to be held of a superior lord. The nature and duration of the estate are sometimes defined in the "premises," by which term are designated all those parts of a deed which go before the

<sup>1</sup> Co. Litt. 1 b. Littleton says: "Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin, *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance." Coke comments thereupon as follows: "'Fee' cometh of the French *fief*,

i. e. *prædium beneficiarium*, and legally signifieth inheritance, as our author himself expoundeth it. And 'simple' is added for that it is descendible to his heirs generally, that is, simply, without restraint to the heirs of his body, or the like." Co. Litt. 345 a.

<sup>2</sup> *Clark v. Baker*, 14 Cal. 612, 631, per Field, C. J.

<sup>3</sup> Shep. Touch. 74.

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habendum. In naming the grantee in the granting clause, if the words "and his heirs" are added, the grantee takes an estate in fee simple, though the habendum clause be wholly omitted.<sup>1</sup> It is not necessary, therefore, that there should be any habendum clause. "Originally, under the feudal system, the office of the habendum and tenendum clauses was to define the quantity of interest or the estate which the grantee is to have in the property granted, and the tenure upon or under which it was to be held. Since the practical abolition of feudal tenures, the only object of the clause is to state the character of the grantee's estate. But although the words of limitation usually appear in the habendum as an independent clause of the deed, it is not necessary that they should, if they appear in some other part, as in the premises."<sup>2</sup>

If the granting clause is either silent or ambiguous as to the estate intended to be granted, the habendum must be resorted to in order to ascertain the nature and extent of such estate.<sup>3</sup>

A deed which in the granting clause is to a woman "and her children and assigns," habendum to her "and her heirs and assigns," conveys to her an estate in fee.<sup>4</sup>

If the habendum be omitted, the grantee takes the estate limited in the premises. If in the premises the land is granted to one without words of inheritance, and there is no habendum, the grantee takes an estate for life. If the grant in the premises is to one and his heirs, he takes an estate in fee without the aid of any habendum.<sup>5</sup>

563. The habendum may explain, enlarge, or qualify, but cannot contradict or defeat, the estate granted by the premises.<sup>6</sup>

<sup>1</sup> Shep. Touch. 75; Buckler's Case, 2 Coke, 55 b; Goodtitle v. Gibbs, 5 B. & C. 717, 8 D. & Ry. 502.

<sup>2</sup> Karchner v. Hoy, 151 Pa. St. 383, 390, 25 Atl. Rep. 20, per Sterrett, J. And see Major v. Buckley, 51 Mo. 227; Montgomery v. Sturdivant, 41 Cal. 290.

<sup>3</sup> Mitchell v. Wilson, 3 Cranch C. C. 242; Havens v. Seashore Land Co. 47 N. J. Eq. 365, 371, 20 Atl. Rep. 497; Staffordville Gravel Co. v. Newell, 53 N. J. L. 412, 415, 19 Atl. Rep. 209; Riffin v. Love, 72 Ill. 553; Bodine v. Arthur, 91 Ky. 53, 14 S. W. Rep. 904.

<sup>4</sup> Rines v. Mansfield, 96 Mo. 394, 9 S. W. Rep. 798.

<sup>5</sup> Shep. Touch. 75; Major v. Buckley, 51 Mo. 227; Kenworthy v. Tullis, 3 Ind. 96; Fulbright v. Yoder, 113 N. C. 456, 18 S. E. Rep. 713.

<sup>6</sup> Co. Litt. 299 a; Tyler v. Moore, 42 Pa. St. 374, 386; Watters v. Bredin, 70 Pa. St. 235; Warn v. Brown, 102 Pa. St. 347; Moss v. Sheldon, 3 Watts & S. 160; Rines v. Mansfield, 96 Mo. 394, 9 S. W. Rep. 798; Jamaica Pond Aqueduct Co. v. Chandler, 9 Allen, 159; Breed v. Osborne, 113 Mass. 318; Chaffee v. Dodge, 2 Root, 205; Thompson v. Carl, 51 Vt. 408.

The premises of a deed are often expressed in general terms which admit of explanations which are usually found in the habendum. The premises frequently do not describe, or profess to describe, the quantum or extent of the estate granted or intended to be granted.<sup>1</sup> If no words of inheritance are used in the premises, the grantee by the premises takes by implication only a life estate at most. The habendum may then by express limitation define the estate granted as an estate for life in fee, or in fee tail, and the estate so expressly defined necessarily excludes the uncertain implication from the premises.<sup>2</sup>

Thus, where a deed grants certain lands to the grantee without defining the interest intended to be conveyed, habendum to the use of the grantee "during the term of her natural life," even under a statute which makes every conveyance a fee, when no contrary intention appears by the use of express terms, or is necessarily implied, the grantee takes only a life estate. "As, then, the premises do not in express terms convey a fee, and as, in the absence of words of inheritance, an implication that a fee was designed to be conveyed can only arise where the intention to convey a less estate is not disclosed, and as the intention to convey a less estate than a fee is most unequivocally expressed, it follows, as a matter of course, that there is no repugnancy between the granting clause and the habendum, and that the habendum must be given effect, because it is the only part of the deed which purports to describe the quantum of estate conveyed."<sup>3</sup>

**564.** If the premises express an estate in fee, this cannot be wholly annulled by anything in the habendum. The habendum may confirm, qualify, or limit the estate or fee declared in the premises;<sup>4</sup> but so far as the habendum is inconsistent with the declaration in the premises it must be rejected.<sup>5</sup>

It is largely from this distinction that the rule is drawn that, in case the premises and the habendum of a deed are irreconcilable,

<sup>1</sup> *Doren v. Gillum*, 136 Ind. 134, 35 N. E. Rep. 1101; *Edwards v. Beall*, 75 Ind. 401; *Carson v. McCaslin*, 60 Ind. 334.

<sup>2</sup> *Berry v. Billings*, 44 Me. 416, 423, 69 Am. Dec. 107; *Riggin v. Love*, 72 Ill. 553; *Montgomery v. Sturdivant*, 41 Cal. 290; *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. Rep. 904; *Bean v. Kenmuir*, 86 Mo. 666.

<sup>3</sup> *Kelly v. Hill* (Md.), 25 Atl. Rep. 919, per McSherry, J. See, also, *Winter v. Gorsuch*, 51 Md. 180, 183; *Farquharson v. Eichelberger*, 15 Md. 63, 72.

<sup>4</sup> *Breed v. Osborne*, 113 Mass. 318.

<sup>5</sup> *Baldwin's Case*, 2 Coke Rep. 23; *Earl of Rutland's Case*, 8 Rep. 55 a; *Winter v. Gorsuch*, 51 Md. 180; *Riggin v. Love*, 72 Ill. 553, per Scholfeld, J.

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the premises will control; as where in the premises the grant is to one and his heirs, and the habendum is to him for life.<sup>1</sup>

Other reasons, however, have been assigned for the rule that the premises shall control when repugnant to the habendum. "This doctrine proceeds upon the principle that, where there are two clauses in a deed repugnant to each other, the first shall prevail;<sup>2</sup> and every deed is expounded most strongly against the grantor, and most for the advantage of the grantee; and therefore the grantee shall take by the premises, if that be most beneficial for him, and not by the habendum; and the grantor shall not be allowed, by any subsequent part of the deed, to contradict or retract the gift made in the premises."<sup>3</sup> The latter reason, namely, that deeds shall be construed most strongly against the grantor, is assigned in several American cases.<sup>4</sup>

**565. A habendum clause which is repugnant to the estate already vested by the deed is void.<sup>5</sup>** It does not matter whether the repugnancy be in respect to the estate conveyed, the grantee who is to take, or the quantity of the thing conveyed.

<sup>1</sup> *Goodtitle v. Gibbs*, 5 B. & C. 709; *Faivre v. Daley*, 93 Cal. 664, 29 Pac. Rep. 256; *Karchner v. Hoy*, 151 Pa. St. 383, 25 Atl. Rep. 20; *Moore v. Waco*, 85 Tex. 206, 20 S. W. Rep. 61; *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. Rep. 904, where the court say: "It is undoubtedly true that in case of repugnancy between the two, and it cannot be determined from the whole instrument and attending circumstances with reasonable certainty that the grantor intended that the habendum should control, the conveyancing clause must in that case control, for the reason that words of conveyance are necessary to the passage of the title, and the habendum is not ordinarily an indispensable part of a deed."

<sup>2</sup> *Leicester v. Biggs*, 2 Taunt. 113. In *Barnett v. Barnett* (Cal.), 37 Pac. Rep. 1049, it is stated that this rule is only another form of the rule of construction given in Civ. Code, § 1070, that, "if several parts of a grant are absolutely irreconcilable, the former part prevails."

<sup>3</sup> *Baldwin's Case*, 2 Coke Rep. 23, Thomas' ed., note.

<sup>4</sup> *Budd v. Brooke*, 3 Gill, 198; *Winter v. Gorsuch*, 51 Md. 180, 185.

<sup>5</sup> *Co. Litt.* 299 a; *Goodtitle v. Gibbs*, 5 B. & C. 709; *Smith v. Smith*, 71 Mich. 633, 40 N. W. Rep. 21; *Havens v. Seashore Land Co.* 47 N. J. Eq. 365, 20 Atl. Rep. 497; *Henderson v. Mack*, 82 Ky. 379; *Ratcliffe v. Marra*, 87 Ky. 26, 7 S. W. Rep. 395, 8 S. W. Rep. 876; *Clay v. Chenault* (Ky.), 10 S. W. Rep. 650; *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. Rep. 904; *Hafner v. Irwin*, 4 Dev. & B. 433, 435, 34 Am. Dec. 390; *Robinson v. Payne*, 58 Miss. 690; *Huntington v. Lyman*, 138 Mass. 205; *Pynchon v. Stearns*, 11 Met. 312, 316, 45 Am. Dec. 210; *Winter v. Gorsuch*, 51 Md. 180; *Farquharson v. Eichelberger*, 15 Md. 63; *Budd v. Brooke*, 3 Gill, 198, 235, 43 Am. Dec. 321; *Foreman v. Presbyterian Asso.* (Md.) 30 Atl. Rep. 1114; *Nightingale v. Hidden*, 7 R. I. 115; *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363; *Warn v. Brown*, 102 Pa. St. 347; *Tyler v. Moore*, 42 Pa. St. 374, 387, per Strong, J.; *Wager v. Wager*, 1 Serg. & R. 374; *Green Bay Canal Co. v. Hewett*, 55 Wis. 105, 12 N. W. Rep. 382.

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The habendum can affect the grant only when it can be construed as consistent with the premises. It cannot frustrate the grant already made in the premises, nor abridge or lessen such grant. Thus, where a grant was made by a father to his son "and to his heirs for the use, benefit, and support of himself and his family, and the proper education of his children," but the habendum was "for the period of his natural life, and after his death to his children in fee simple, for the purposes and uses above set forth," with a covenant that the grantee should use the property for such purposes, and not convey it or any interest in it during the lifetime of any of his children, or of any of his brothers or sisters, it was held that by the premises a fee vested in the grantee, and the habendum, being repugnant to the granting clause, must be rejected.<sup>1</sup>

566. Effect will be given to both the granting clause and the habendum, if possible to do so by fair construction, where the interest intended to be conveyed is defined in both clauses. If the habendum is to the grantee for the life of another, after a grant to him and his heirs, there is no repugnancy. The habendum is in such case consistent with the grant, since the word "heirs" will still have effect; <sup>2</sup> "for when an estate is given to one and his heirs for the life of another, the heir may take and hold after the death of his ancestor as a special occupant. The rule of construction in such cases is held to be that, when the estate is given in the premises to one and his heirs generally, habendum to him and other heirs, the habendum may be used to explain the premises, by showing what heirs are meant by the grantor, and will not be repugnant; for such explanation is held not to retract the gift in the premises, because the word 'heirs' has still its operation, and by construction is more conformable to the will and intentions of the donor."<sup>3</sup>

Thus an estate tail given in the premises is not enlarged to an estate in fee simple by an habendum to the grantee and his heirs; for it is easy and congruous to suppose that the word "heirs" in the habendum means the same, and was intended to mean the same, as the heirs designated in the premises.<sup>4</sup> This is still more

<sup>1</sup> *Smith v. Smith*, 71 Mich. 633, 40 N. W. Rep. 21. And see *Robinson v. Payne*, 58 Miss. 690.

<sup>2</sup> *Shep. Touch.* 200.

<sup>3</sup> *Rowland v. Rowland*, 98 N. C. 214, 220, per Ashe, J.

<sup>4</sup> *Co. Litt.* 21 a; *Thompson v. Carl*, 51 Vt. 408; *Corbin v. Healy*, 20 Pick. 514.



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clear, where the habendum is to "his heirs as aforesaid." And so, again, a grant to one and his heirs may be reduced to an estate tail by a limitation in the habendum to the heirs of his body.<sup>1</sup> The habendum does not in such case contradict the premises, but only defines what heirs of the grantee were intended by the grant.

There is no repugnancy between the premises and the habendum where by the former there is a grant in fee, and by the latter the fee is restricted to a base or determinable fee; for the estate is still a fee. It may continue in the grantee and his heirs forever, but may be terminated by the act or event expressed in the limitation. In this respect it is similar to a grant upon condition.<sup>2</sup>

567. If the premises and the habendum cannot be reconciled by construction, that clause will control which most precisely defines the estate intended to be conveyed, if this is in harmony with the general intention as gathered from the whole instrument.<sup>3</sup> Thus, where the granting clause of a deed of settlement by a husband on his wife gave her the fee, but the habendum provided that she should hold the land while she remained his widow, and that at her decease it should revert to the grantor and his heirs, it was held that the habendum controlled the construction of the deed. The court regarded the intention as expressed and as indicated by the situation of the grantor, who was an old man, providing for a young wife and one child, an infant at the time, and having no other property or estate.<sup>4</sup>

The habendum, when not clearly contradictory to the granting words, is to be resorted to equally with the other parts of the deed in order to arrive at the grantor's intention.<sup>5</sup>

A grantor conveyed land to his daughter and her husband, "their heirs and assigns," by a deed containing the following provision in the premises after the description: "It is expressly understood by all parties hereto that, if the said husband and wife

<sup>1</sup> *Altham's Case*, 8 Coke Rep. 150 b, 154 b; *Tyler v. Moore*, 42 Pa. St. 374, 386, per Strong, J.

<sup>2</sup> *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159, 168, per Bigelow, C. J.

<sup>3</sup> *Karchner v. Hoy*, 151 Pa. St. 383, 25 Atl. Rep. 20.

<sup>4</sup> *Whitby v. Duffy*, 135 Pa. St. 620, 19

Atl. Rep. 1065. Per Paxson, C. J.: "It would be a violent presumption, too violent to be entertained for a moment, to suppose that he intended this estate to go to a second husband of his wife, after her death, to the exclusion of his own child."

<sup>5</sup> *Henderson v. Mack*, 82 Ky. 379.

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should have a child or children of their two bodies begotten and born, then the land herein conveyed shall vest in the said husband and wife and their heirs forever. But should this event not happen, then the said husband and wife, or the survivor of either of them, shall have and enjoy a life estate in the said land." It was provided that if no issue were born the land should be sold, and the proceeds divided among certain persons mentioned. The habendum clause was as follows: "To have and to hold the said lands, hereditaments, and premises hereby granted or mentioned, and intended so to be, with the appurtenances, unto the said parties of the second part, their heirs and assigns, to and for the only proper use and behoof of the said parties of the second part, their heirs and assigns forever." The wife died before her husband, never having had any child or children. It was held that the husband took a life estate only in the land. The court said: "We think the quantum of interest intended to be conveyed is clearly and expressly defined in the premises of the deed. If the habendum were entirely eliminated from the instrument, it would still be an undoubtedly good and valid conveyance of the estate intended to be granted. Whether we regard the special provision for enlarging the estate into a fee, in the event of the grantees having 'a child or children of their two bodies begotten and born,' as a condition precedent to such enlargement or not, the result is the same. Nor does it make any difference that the provision referred to is separated from other clauses or phrases relating to the quantum of interest. . . . The interest granted is so fully, circumstantially, and precisely defined and limited in the special clause referred to, that there can be no mistake, in that regard, as to the expressly declared understanding and intention of the parties to the deed; and there appears to be no good reason why that intention should not prevail."<sup>1</sup>

If the estate is briefly defined in the premises and more specifically in the habendum, the latter will have a controlling effect, for it is the legitimate office of this clause to enlarge and fully define the estate described in less specific terms in the premises.<sup>2</sup>

A recital in the premises of a deed, that the grantors "convey

<sup>1</sup> *Karchner v. Hoy*, 151 Pa. St. 383, 389, 391, per Sterrett, J. *v. Tatum*, 81 Ala. 388, 1 So. Rep. 195; *Rines v. Mansfield*, 96 Mo. 394, 9 S. W.

<sup>2</sup> *Karchner v. Hoy*, 151 Pa. St. 383, 390, 25 Atl. Rep. 20, per Sterrett, J.; *Tatum* 192. Rep. 798; *Green v. Sutton*, 50 Mo. 186,

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and warrant" the land to persons named, is not totally repugnant to the habendum clause which provides that they are to hold it "during their natural lives, and then to descend to another." The use of the word "descend" does not necessarily show that the first takers were to take an estate in fee.<sup>1</sup>

568. The inclination of many courts at the present day is to regard the whole instrument, without reference to formal divisions. The deed is so construed, if possible, as to give effect to all its provisions, and thus to effectuate the intent of the parties. When an instrument is informal, the interest transferred by it depends not so much upon the words and phrases it contains as upon the intention of the parties as indicated by the whole instrument.<sup>2</sup> This view is expressed by the Supreme Court of California in a recent case: <sup>3</sup> "The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein; but, for the purpose of ascertaining this intention, the entire instrument, the habendum as well as the premises, is to be considered; and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum will prevail over the granting clause."

Where a husband conveyed land to his wife "and her heirs and assigns forever," but the habendum limited the conveyance to her separate use, "with power to sell, and, by deed made and executed jointly with her husband, convey the land and invest

<sup>1</sup> Doren v. Gillum, 136 Ind. 134, 35 N. E. Rep. 1101. N. W. Rep. 964. Oregon: Beebe v. McKenzie, 19 Ore. 296, 24 Pac. Rep. 236.

<sup>2</sup> California: Faivre v. Daley, 93 Cal. 664, 29 Pac. Rep. 256. Connecticut: Bartholomew v. Muzzy, 61 Conn. 387, 23 Atl. Rep. 604; Bryan v. Bradley, 16 Conn. 474. Illinois: Mittel v. Karl, 133 Ill. 65, 24 N. E. Rep. 553; Riggin v. Love, 72 Ill. 553; Pool v. Blakie, 53 Ill. 495. Indiana: Carson v. McCaslin, 60 Ind. 334, 337; Edwards v. Beall, 75 Ind. 401. Kentucky: Henderson v. Mack, 82 Ky. 379. Maine: Higgins v. Wasgatt, 34 Me. 305. Massachusetts: Bridge v. Wellington, 1 Mass. 219, 229; Breed v. Osborne, 113 Mass. 318. Minnesota: Grueber v. Lindenmeier, 42 Minn. 99, 43 N. W. Rep. 964. Oregon: Beebe v. McKenzie, 19 Ore. 296, 24 Pac. Rep. 236. Pennsylvania: Ogden v. Brown, 33 Pa. St. 247; Lemon v. Graham, 131 Pa. St. 447, 453, 19 Atl. Rep. 48; Dreishach v. Serfass, 126 Pa. St. 32; Tyler v. Moore, 42 Pa. St. 374, 387; Wager v. Wager, 1 S. & R. 374. Tennessee: Hanks v. Folsom, 11 Lea. 555, 560; Beecher v. Hicks, 7 Lea. 207, 212; Fogarty v. Stock, 86 Tenn. 610, 8 S. W. Rep. 846. Texas: Hancock v. Butler, 21 Tex. 804.

<sup>3</sup> Barnett v. Barnett, 104 Cal. 298, 300, 37 Pac. Rep. 1049. And see Ratcliffe v. Marrs, 87 Ky. 26, 7 S. W. Rep. 395, 8 S. W. Rep. 876; Bodine v. Arthur, 91 Ky. 53, 14 S. W. Rep. 904.

the proceeds in other property, to be held" in the same manner, and also provided that if the husband should survive the land should revert to him in fee simple, it was held that the habendum, though repugnant to the estate granted in the premises, should be given controlling effect, as being in accord with the intention of the grantor as gathered from the entire instrument.<sup>1</sup>

This rule of construction does not, however, demand that all parts of the deed shall be treated as of equal weight in determining the effect of the instrument.<sup>2</sup>

**569.** In Kentucky it has been declared that the habendum controls the granting clause when these clauses are repugnant, since the statute declaring words of inheritance unnecessary. Although by the granting clause a conveyance in fee simple is implied, but the habendum is repugnant to such an inference, the habendum will be given controlling effect. Thus, where a father, "for and in consideration of natural affection" for his daughter and son, conveyed certain land, habendum to them and their children forever, there being nothing in the deed indicating that the grantor used the word "children" in the sense of "heirs," it was held that, as the habendum controls the granting clause when they are repugnant, and as the statutory provision, that every estate created by deed "without words of inheritance" shall be deemed a fee simple, applies only where a different purpose does not appear "by express words or necessary inference," the daughter and son took only a life estate, remainder to their children.<sup>3</sup>

It has also been said that the habendum should control because it is the last expression of the grantor.<sup>4</sup>

**570.** An absolute conveyance in fee is not defeated or qualified by a subsequent recital. Thus, a deed by a father to his infant daughter and her heirs, which also recites that the same is to be held in trust by her grandfather until she shall become of age, passes the title to the property directly to the daughter upon delivery of the deed, and no title or trust is vested in the grandfather.<sup>5</sup>

<sup>1</sup> *Fogarty v. Stock*, 86 Tenn. 610, 8 S. W. Rep. 846.

<sup>2</sup> *Moore v. Waco*, 85 Tex. 206, 20 S. W. Rep. 61.

<sup>3</sup> *Baskett v. Sellers* (Ky.), 19 S. W. Rep. 9. See *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. Rep. 904.

<sup>4</sup> *Henderson v. Mack*, 82 Ky. 379; *Ratcliffe v. Marrs*, 87 Ky. 26, 7 S. W. Rep. 395, 8 S. W. Rep. 876. See *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. Rep. 904.

<sup>5</sup> *Annis v. Wilson*, 15 Colo. 236, 25 Pac. Rep. 304.

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After a conveyance in fee, a clause in the deed, indicating the motive or purpose of the conveyance, will not limit its effect as a conveyance of the fee. Thus, where a wife conveyed to her husband certain land in fee, and immediately following the description in the deed there was a clause which declared that the object and intention of the conveyance was to make good certain mortgages which the husband had given upon the land, it was held that her deed was effectual as a conveyance of the fee, and that the motive for making the conveyance was immaterial.<sup>1</sup>

But the context may show that the word "heirs" is to be rejected, as when the habendum is to one, his heirs and assigns, "from the perfection of these presents for and during the term of his natural life."<sup>2</sup>

A deed in fee and an instrument executed at the same time by the grantee, declaring the intention of the parties to be that the grantee should hold only a life estate, should be read together as one instrument; and the grantor is entitled to relief in equity either by reforming the deed so that it should express only a life estate, or by restraining the grantee from asserting any greater estate or interest.<sup>3</sup>

Where the granting clause conveyed an estate in fee, "subject to the limitations hereinafter expressed as to part thereof," and the habendum limited one half part of the land to the grantee for life, and at his decease to descend to his children, it was held that the habendum reducing the estate in one half part to a tenancy for life was not repugnant to the premises; for the premises indicate a limitation of the estate in fee as to a part of the land, and this limitation is found in the habendum. The premises are not in such case complete without the words of the habendum. There is no repugnancy between these clauses.<sup>4</sup>

II. *The naming of the Grantee in the Habendum Clause.*

571. The grantee should be named in the habendum as well as in the granting clause. If no grantee be named in the premises, the grantee named in the habendum takes the estate.<sup>5</sup> If two

<sup>1</sup> Bodwell Granite Co. v. Lane, 83 Me. 168, 21 Atl. Rep. 829; Fowler v. Black, 136 Ill. 363, 26 N. E. Rep. 596.

<sup>2</sup> Re Hammersly, 11 Ir. Ch. 229, 12 Ir. Ch. 319.

<sup>3</sup> Scofield v. Quinn, 54 Minn. 9, 55 N. W. Rep. 745.

<sup>4</sup> Tyler v. Moore, 42 Pa. St. 374.

<sup>5</sup> Co. Litt. 7 a, 26 b; Shep. Touch. 75; Spyve v. Topham, 3 East, 115; Sumner v.

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or more persons are named in the premises, and only one of them is named in the habendum, he alone will take an immediate estate. In such case there is no repugnancy between the premises and the habendum, and the manifest intention of the grantor is effectuated by making the person named in the habendum the grantee under the deed.

**572.** A stranger to the premises in which a grantee is named cannot take as a grantee in fee. If in the premises one person be named as grantee with words of inheritance, but the habendum is to another, the habendum is repugnant and void, and the person named in the premises will take.<sup>1</sup>

**573.** A use may be declared in the habendum to a person to whom no estate is granted in the premises.<sup>2</sup>

A remainder may also be declared in the habendum to one who is not named in the premises.<sup>3</sup>

**574.** If one grantee is named in the premises, and in the habendum the same person with another is named, the grantee named in the premises will take the estate conveyed, and the person not so named will take nothing.<sup>4</sup>

In South Carolina, however, it is held that if in the premises a person is named as grantee without words of inheritance, and in the habendum he is again named with another person not named in the premises, with words of inheritance as to both, the habendum will control, and each of them will take an estate in fee in the land.<sup>5</sup>

Williams, 8 Mass. 162, 174, 5 Am. Dec. 83, per Sedgwick, J.; *Berry v. Billings*, 44 Me. 416, 69 Am. Dec. 107; *Irwin v. Longworth*, 20 Ohio, 581; *McLeod v. Tarrant*, 39 S. C. 271, 274, 280, 17 S. E. Rep. 773, per Pope, J., and McIver, C. J.

<sup>1</sup> *Blair v. Osborne*, 84 N. C. 417; *Hafner v. Irwin*, 4 Dev. & B. 433, 34 Am. Dec. 390; *McLeod v. Tarrant*, 39 S. C. 271, 17 S. E. Rep. 773, per McIver, C. J., dissenting.

<sup>2</sup> *Sammes' Case*, 13 Coke, 54; *Spyve v. Topham*, 3 East, 115.

<sup>3</sup> Co. Litt. 27 a, 231 a; *Windsmore v. Hobart*, Hob. 313 b; *Owen's Case*, 3 Leon.

60; *Spyve v. Topham*, 3 East, 115; *Kerr v. Kerr*, 4 Ir. Ch. 493; *Blair v. Osborne*, 84 N. C. 417; *Beecher v. Hicks*, 7 Lea, 207, 213, per Cooper, J.; *McCulloch v. Holmes*, 111 Mo. 445, 19 S. W. Rep. 1096; *Wager v. Wager*, 1 Serg. & R. 374.

<sup>4</sup> *Sammes' Case*, 13 Coke, 54; *Windsmore v. Hobart*, Hob. 313 b, Cro. Eliz. 58.

<sup>5</sup> *McLeod v. Tarrant*, 39 S. C. 271, 17 S. E. Rep. 773, McIver, C. J., dissenting on the ground that a person cannot take an immediate estate by the habendum to whom no grant is made in the premises.

III. *The Word "Heirs" essential at Common Law to create an Estate in Fee.*

575. To create an estate in fee simple by deed it is essential that the limitation shall be to the grantee "and his heirs." Littleton states the universal rule:<sup>1</sup> "If a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, 'to have and to hold to him and to his heirs;' for these words 'his heirs' make the estate of inheritance. For if a man purchase lands by these words, 'to have and to hold to him forever,' or by these words, 'to have and to hold to him and his assigns forever,' — in these two cases he hath but an estate for term of life, for that there lack these words, 'his heirs,' which words only make an estate of inheritance in all feoffments and grants." An estate in fee cannot be created by describing it as such, as "to have and to hold to him in fee simple."<sup>2</sup> Only an estate for life is created by such a deed. The words "his heirs" are absolutely essential to the creation of an estate in fee simple. No other words and no description of the estate is sufficient. "These words only," says Littleton, "make an estate of inheritance in all feoffments and grants."<sup>3</sup> It does not avail to say

<sup>1</sup> Littleton, § 1, Co. Litt. 6 a.

<sup>2</sup> By statute in England these are now the appropriate words to create an estate in fee.

<sup>3</sup> Shep. Touch. 106; *Bridgewater v. Bolton*, 6 Mod. 106, 109. *Arkansas*: *Patterson v. Moore*, 15 Ark. 222. *Illinois*: *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377. *Maryland*: before the act of 1856, ch. 154. Code, art. 21, § 11; *Handy v. McKim*, 64 Md. 560, 4 Atl. Rep. 125; *Brady v. Evans* (Md.), 28 Atl. Rep. 1061; *Hofsass v. Mann*, 74 Md. 400, 22 Atl. Rep. 65; *Merritt v. Disney*, 48 Md. 344. *Massachusetts*: *Buffum v. Hutchinson*, 1 Allen, 58; *Sedgwick v. Lavin*, 10 Allen, 430; *Curtis v. Gardner*, 13 Met. 457; *Ashcroft v. Eastern R. Co.* 126 Mass. 196, 30 Am. Rep. 672.

In the earliest years of the Massachusetts colony a very loose practice had grown up of making conveyances intended to be in fee without the use of the word

"heirs." To stop this, a statute was enacted by the General Court in May, 1651, which recited that "whereas, through unskilfulness of some that make deeds and conveyances of lands and houses, the word 'heir' is oftentimes omitted; . . . for prevention whereof for the time to come, this court ordereth, that in all deeds and conveyances of houses and lands in this jurisdiction, wherein an estate of inheritance is to pass, it shall be expressed to have and to hold to the grantee, 'his heirs and assigns forever.'" In *Feoffees of Grammar School v. Andrews*, 8 Met. 584, 592, the court say: "In construing conveyances made early after the settlement of the country, when conveyancing was little understood, the intention of the parties is to govern, without regarding the rigid rules of construction which would be applicable to recent conveyances, and which might defeat the intution of the

that the grantee is to have and to hold to him forever, or to him and his assigns forever. No matter how plainly it is declared that the grantee is to have an estate in fee simple or in perpetuity, the deed without the word "heirs" will convey to him only a life estate.<sup>1</sup>

The rule that the word "heirs" is essential to create by deed an estate in fee is a purely arbitrary rule of the common law. It is a term of art, which cannot be dispensed with except by legislation.

576. In most of the States the word "heirs" is declared by statute not to be necessary to convey an estate in fee simple, or it is declared that every estate in lands is taken to be an estate in fee simple, unless a less estate is expressly limited or appears to be conveyed by operation of law.<sup>2</sup>

parties, however clearly that might be made to appear."

**Missouri:** *Hogan v. Welcker*, 14 Mo. 177; *Reaume v. Chambers*, 22 Mo. 36; *Martin v. Long*, 3 Mo. 391. **New Jersey:** *Truedell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. Rep. 391; *Adams v. Ross*, 30 N. J. L. 505, 82 Am. Dec. 237; *Kearney v. Maccomb*, 16 N. J. Eq. 189; *Sisson v. Donnelly*, 36 N. J. L. 432; *Melick v. Pidcock*, 44 N. J. Eq. 525, 540; *Chancellor v. Bell*, 45 N. J. Eq. 538, 541. **New York:** *Jackson v. Myers*, 3 Johns. 388, 3 Am. Dec. 504. **North Carolina:** before Code of 1883, *Stell v. Barham*, 87 N. C. 62; *Roberts v. Forsythe*, 3 Dev. 26. **Ohio:** *Young v. Mahoning Co.* 53 Fed. Rep. 895. **Pennsylvania:** *Lemon v. Graham*, 131 Pa. St. 447, 19 Atl. Rep. 48, 25 W. N. C. 339; *Brown v. Mattocks*, 103 Pa. St. 16; *Hileman v. Bouslaugh*, 13 Pa. St. 344, 53 Am. Dec. 474. **South Carolina:** *Bradford v. Griffin*, 40 S. C. 468, 19 S. E. Rep. 76; *McLeod v. Tarrant*, 39 S. C. 271, 17 S. E. Rep. 773; *Bratton v. Massey*, 15 S. C. 277, 284; *Varn v. Varn*, 32 S. C. 77, 85, 10 S. E. Rep. 829; *Jones v. Swearingen* (S. C.), 19 S. E. Rep. 947; *Lorick v. McCreery*, 20 S. C. 424, 430.

<sup>1</sup> *Curtis v. Gardner*, 13 Met. 457; *Engel v. Ayer*, 85 Me. 448, 27 Atl. Rep. 352; *Sedgwick v. Laffin*, 10 Allen, 430; and *Miles v. Fisher*, 10 Ohio, 1, 36 Am. Dec.

61, where the grants were to one and his "successors and assigns." *Hofsaas v. Mann*, 74 Md. 400, 22 Atl. Rep. 65; *Clearwater v. Rose*, 1 Blackf. 137; and *Taylor v. Cleary*, 29 Gratt. 448, where the grants were to one and his "executors, administrators, and assigns." *Kearney v. Maccomb*, 13 N. J. Eq. 189, where the grant was to one and "his legal representatives and assigns." *Foster v. Joice*, 3 Wash. C. C. 498, where the grant was to one "and his generation, to endure so long as the waters of the Delaware should run." See, however, *Stevens v. Dewing*, 2 Vt. 411; and *Arms v. Burt*, 1 Vt. 303, 18 Am. Dec. 680, where a grant to one "so long as wood grows, and water runs" was held to create a fee.

<sup>2</sup> **Alabama:** Code, 1886, § 1824. **Arizona:** R. S. 1887, ¶ 217. **Arkansas:** Dig. of Stats. 1884, § 641. **California:** Civ. Code, §§ 1072, 1105; *Montgomery v. Sturdivant*, 41 Cal. 290. **Colorado:** G. S. 1883, § 204; Annot. Stats. 1891, § 433. **Georgia:** Code 1882, § 2248, being act of 1821; *Greer v. Pate* (Ga.), 11 S. E. Rep. 869. **Idaho:** R. S. 1887, §§ 2905, 2927. **Illinois:** R. S. 1889, ch. 30, § 13. **Indiana:** R. S. 1894, § 3348, act of May 6, 1852. **Iowa:** R. S. 1888, § 3100. **Kansas:** G. S. 1889, ¶ 1109. **Kentucky:** G. S. 1894, § 2342. **Maryland:** Pub. G. L. 1888, art. 21, ¶ 11. Prior to the act of



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The intent, under such a statute, to pass a less estate than a fee is shown by a limitation in a habendum for the life of the grantee, remainder to his children. Under the strict rules of the common law a remainder may be declared in the habendum to one not mentioned in the premises.<sup>1</sup>

The English Conveyancing and Law of Property Act of 1881<sup>2</sup> provides that "it shall be sufficient, in the limitation of an estate in fee simple, to use the words 'in fee simple,' without the word 'heirs;' and in the limitation of an estate in tail, to use the words 'in tail' without the words 'heirs of the body;' and in the limitation of an estate in tail male or in tail female, to use the words 'in tail male' or 'in tail female,' as the case requires, without the words 'heirs male of the body' or 'heirs female of the body.'" Regarding this change it is observed in Bythewood's Precedents<sup>3</sup> that it "may be doubted whether there is much advantage to be obtained from this clause so far as regards ordinary purchase deeds. Words of limitation must still be used, and the new statutory words of limitation do not seem to be an improvement upon the accustomed form."

577. Coke declares that the word "heirs" must be used in the plural number. "For," he observes,<sup>4</sup> "if a man give land to a man and to his heir in the singular number, he hath but an

1856, ch. 154, the rule of the common law prevailed. *Michigan*: Annot. Stats. 1882, § 5730. *Minnesota*: G. S. 1894, § 2163. *Mississippi*: Annot. Code, 1892, § 2435. *Missouri*: R. S. 1879, § 3939; R. S. 1889, § 8834; *McCullock v. Holmes*, 111 Mo. 445, 19 S. W. Rep. 1096. *Montana*: Comp. Stats. 1887, p. 664, § 278. *Nebraska*: Comp. Stats. 1893, ch. 73, § 49. *Nevada*: G. S. 1885, § 2612. *New Hampshire*: In *Cole v. Lake Co.* 54 N. H. 242, 290, it was judicially determined without the aid of a statute that the word "heirs" is not essential to the creation of an estate in fee: "Our conclusion is," says Mr. Justice Ladd, "that the rule which would defeat the obvious intention and destroy the plainly expressed contract of the parties in the present case is not adapted to our institutions, or the condition of things in this State; and that it never became part of the law of the State." *New York*:

4 R. S. 1889, p. 2461. *North Carolina*: Code 1883, § 1280, act of 1879; *Fulbright v. Yoder*, 113 N. C. 456, 18 S. E. Rep. 713. *North Dakota*: Comp. Stats. 1887, § 3241. *Oklahoma*: R. S. 1893, § 1639. *Oregon*: G. L. 1892, § 3005. *South Dakota*: Comp. Stats. 1887, § 3241. *Tennessee*: Code 1884, § 2812, act of 1851, ch. 33; *Hanks v. Folsom*, 11 Lea, 555, 560; *Beecher v. Hicks*, 7 Lea, 207, 211. *Texas*: R. Civ. Code 1889, art. 551. *Virginia*: Code 1887, § 2420. *Washington*: G. S. 1891, § 1429. *West Virginia*: Code 1891, ch. 71, § 8. *Wisconsin*: Annot. Stats. 1889, § 2206. *Wyoming*: R. S. 1887, § 34.

<sup>1</sup> *McCullock v. Holmes*, 111 Mo. 445, 19 S. W. Rep. 1096; *Farrar v. Christy*, 24 Mo. 453.

<sup>2</sup> 44 & 45 Vict. ch. 41, § 51.

<sup>3</sup> Vol. v. p. 207.

<sup>4</sup> Co. Litt. 8 b.

estate for life, for his heir cannot take a fee simple by descent, because he is but one, and therefore in that case his heirs shall take nothing." But Coke's opinion has been denied by later authorities,<sup>1</sup> and it is doubtful if it should be followed at the present day. The word "heir" would doubtless be regarded as *nomen collectivum*, or a clerical mistake, for "heirs."<sup>2</sup> The habendum must be to the grantee and his heirs, and not "or his heirs." In the latter form he would take only an estate for life, for the uncertainty; though, as suggested by Lord Hardwicke, the word "or" might be construed as a clerical error for "and."<sup>3</sup> If there be more than one grantee, the habendum must be to them and "their heirs."<sup>4</sup> If the word "their" be omitted, the grantees "have but an estate for life for the uncertainty." But it is said that if land be given to one man "and heirs," omitting "his," the fee passes notwithstanding.<sup>5</sup>

578. The word "issue," when used in place of the word "heirs" in a deed, is a word of purchase, and not of limitation.<sup>6</sup> The word "issue" may describe a class of persons who are to take as joint tenants with an ancestor named. It may describe a class who are to take as purchasers at a time fixed. In wills it may denote an indefinite succession of lineal descendants who are to take by inheritance.<sup>7</sup> It seldom has the latter meaning in deeds.

579. The word "children" is a word of purchase and not a word of limitation.<sup>8</sup> It will be taken to have been used in

<sup>1</sup> Hargrave, note 4, Co. Litt. 85; Dubber v. Trollop, 8 Vin. Abr. 233, p. 13, per Eyre, C. J., who says that the opinion of Coke is not warranted by anything in Littleton; Whiting v. Wilkins, 1 Bula. 219, a case of a devise; Hall v. Vandegrift, 3 Binn. 374, also a case of a devise; Manwaring v. Tabor, 1 Root, 79, a case of a deed.

<sup>2</sup> Huntington v. Lyman, 138 Mass. 205.

<sup>3</sup> Wright v. Wright, 1 Ves. Sr. 409, 411.

<sup>4</sup> Mallory's Case, 5 Rep. 111 b.

<sup>5</sup> Co. Litt. 8 b.

<sup>6</sup> McIlhinny v. McIlhinny, 137 Ind. 411, 37 N. E. Rep. 147; Melsheimer v. Gross, 58 Pa. St. 412; Moss v. Sheldon, 3

Watts & S. 160; Mendenhall v. Mower, 16 S. C. 303, 311; Bradford v. Griffin, 40 S. C. 468, 19 S. E. Rep. 76.

<sup>7</sup> Mendenhall v. Mower, 16 S. C. 303, 311; Mangum v. Piester, 16 S. C. 316.

<sup>8</sup> Alabama: Dunn v. Davis, 12 Ala. 135; May v. Ritchie, 65 Ala. 602. Georgia: Ewing v. Shropshire, 80 Ga. 374, 385, 7 S. E. Rep. 554. Indiana: Burns v. Weesner, 134 Ind. 442, 34 N. E. Rep. 10; Tinder v. Tinder, 131 Ind. 381, 30 N. E. Rep. 1077; McIlhinny v. McIlhinny, 137 Ind. 411, 37 N. E. Rep. 147; Jackson v. Jackson, 127 Ind. 346, 26 N. E. Rep. 897; Fountain C. & M. Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. Rep. 202, 52 Am. Rep. 645; Shimer v. Man, 99 Ind. 190, 50 Am. Rep. 82; Owen v. Cooper, 46

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its natural sense unless it is so controlled and limited by other expressions in the deed as to show it was intended as a word of limitation.<sup>1</sup>

580. A deed to a parent and his children makes the children tenants in common with their parent. But only the children *in esse* and living at the time of the conveyance, including a child *en ventre sa mère*, take under the deed,<sup>2</sup> unless the deed expressly or impliedly includes children thereafter to be born.

But other authorities hold that a conveyance to a parent and his children vests a life estate only in the parent, with remainder in fee to the children as a class, so that those in being at the date of the deed as well as those subsequently born are entitled to take in distribution on the termination of the life estate.<sup>3</sup> One reason for regarding such a conveyance as creating an estate in remainder in the children, rather than an estate in common in the mother and her children, especially in case the conveyance is by the father of the children, is that it is presumed that he intends to provide for his children, and the provision is more effectual if it be regarded as creating an estate in remainder in the children, as otherwise, upon the death of the mother, part of the property might pass to strangers in blood to the grantor.<sup>4</sup>

A deed to a grantee named in the premises without words of limitation, habendum to him for life, and at his decease in equal

Ind. 524; *Andrews v. Spurlin*, 35 Ind. 262. Illinois: *Chapin v. Crow*, 147 Ill. 219, 35 N. E. Rep. 536; *Beacroft v. Strawn*, 67 Ill. 28; *Baker v. Scott*, 62 Ill. 86. Kentucky: *Baskett v. Sellers* (Ky.), 19 S. W. Rep. 9; *Goodridge v. Goodridge*, 91 Ky. 507, 16 S. W. Rep. 270. Mississippi: *Cannon v. Barry*, 59 Miss. 289. New Jersey: *Adams v. Ross*, 30 N. J. L. 505, 82 Am. Dec. 237; *Price v. Sisson*, 13 N. J. Eq. 168. New York: *In re Sanders*, 4 Paige, 293; *Rogers v. Rogers*, 3 Wend. 503, 20 Am. Dec. 716; *Chrystie v. Phyfe*, 19 N. Y. 344. Pennsylvania: *Hague v. Hague*, 161 Pa. St. 643, 29 Atl. Rep. 261; *Edward's App.* 108 Pa. St. 283; *Guthrie's App.* 37 Pa. St. 9; *Melsheimer v. Gross*, 58 Pa. St. 412. Vermont: *Ford v. Flint*, 40 Vt. 382.

<sup>1</sup> *Chapin v. Crow*, 147 Ill. 219, 35 N. E. Rep. 536.

<sup>2</sup> *Faloon v. Simahauser*, 130 Ill. 649, 22 N. E. Rep. 835; *Glass v. Glass*, 71 Ind. 392; *Heath v. Heath*, 114 N. C. 547, 19 S. E. Rep. 155; *Dupree v. Dupree*, *Busbee* (N. C.) Eq. 164, 59 Am. Dec. 590; *Powell v. Morisey*, 84 N. C. 421; *Gay v. Baker*, 5 Jones Eq. 344, 78 Am. Dec. 229; *Hunt v. Satterwhite*, 85 N. C. 73; *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. Rep. 236.

<sup>3</sup> *Coursey v. Davis*, 46 Pa. St. 25, 84 Am. Dec. 519; *White v. Williamson*, 2 Grant, 249; *Wolford v. Morgenthal*, 91 Pa. St. 30; *Haskins v. Tate*, 25 Pa. St. 249; *Tyler v. Moore* (Pa. St.), 17 Atl. Rep. 216; *Hague v. Hague*, 161 Pa. St. 643, 29 Atl. Rep. 261, overruling *Shirlock v. Shirlock*, 5 Pa. St. 367; *Smith v. Upton* (Ky.), 13 S. W. Rep. 721; *Kinney v. Mathews*, 69 Mo. 520.

<sup>4</sup> *Smith v. Upton* (Ky.), 13 S. W. Rep. 721.

shares to his children, passes a life estate to the grantee, with remainder to his children. There is in such case no repugnancy between the granting clause and the habendum.<sup>1</sup>

581. The limitation to heirs need not be made in direct terms, nor need the word be used immediately after the name of the grantee;<sup>2</sup> but the word must appear in some part of the deed other than in connection with the name of the grantor, in order to create an estate in fee.<sup>3</sup>

A limitation to one and his "right heirs" is the same as a limitation to him and "his heirs."<sup>4</sup>

582. The use of the word "heirs" in the warranty clause alone is not sufficient to create an estate in fee. A grant without words of inheritance in the premises, and with no habendum clause, is not enlarged into a fee by a general warranty to the grantee and his heirs. The warranty clause cannot operate to enlarge the estate granted.<sup>5</sup> The rule in North Carolina is otherwise, and was so even before the passage of the act providing that the word "heirs" shall not be necessary to create an estate in fee, and that every estate shall be regarded as an estate in fee unless a less estate appears to be conveyed. There the use of the word "heirs" in the clause of warranty is a sufficient manifestation of an intent to convey an estate in fee simple. "Indeed, the word 'heirs,' as used, has no meaning pertinent, or application if the purpose was to convey but a life estate. Why shall the warranty extend to the heirs of the bargainee if he is to have but a life estate?"<sup>6</sup> Again, the Supreme Court of that State say: "The courts, in order to carry out the intent of the grantor, where it could be gathered from the face of a deed, have, in a liberal spirit, construed conveyances as passing an estate of inheritance in all cases where the word 'heirs' was joined as a qualification to the name or designation of the bargainees, even

<sup>1</sup> *Riggin v. Love*, 72 Ill. 553; *Rupert v. Penner*, 35 Neb. 587, 53 N. W. Rep. 598; *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. Rep. 904.

<sup>2</sup> *Melick v. Pidcock*, 44 N. J. Eq. 525, 540; *Havens v. Seashore Land Co.* 47 N. J. Eq. 365, 371, 20 Atl. Rep. 497.

<sup>3</sup> *Anderson v. Logan*, 105 N. C. 266, 11 S. E. Rep. 361.

<sup>4</sup> *Fletcher v. Fletcher*, 88 Ind. 418.

<sup>5</sup> *Jordan v. Neece*, 36 S. C. 295, 15 S. E. Rep. 202; *Roberts v. Forsythe*, 3 Dev. 26; *Snell v. Young*, 3 Ired. 379; *Register v. Rowell*, 3 Jones, 312; *Hofsass v. Mann*, 74 Md. 400, 22 Atl. Rep. 65; *Sisson v. Donnelly*, 36 N. J. L. 432; *Adams v. Ross*, 30 N. J. L. 505, 82 Am. Dec. 237; *Patterson v. Moore*, 15 Ark. 222.

<sup>6</sup> *Saunders v. Saunders*, 108 N. C. 327, 332, 12 S. E. Rep. 909.

in the clause of warranty, or where the covenant of warranty was confused with the premises or habendum, if, by a transposition of it, or by making a parenthesis, or in any way disregarding punctuation, the word 'heirs' could be made to qualify the apt words of conveyance in the premises, or the words 'to have and to hold' in the habendum and tenendum, even though it was made to do double duty as a part of the covenant of warranty."<sup>1</sup>

583. The word "heirs" may in exceptional cases be interpreted to mean "children," and to be a word of purchase and not a word of limitation; but to have this effect the language used and the intention gathered from the whole deed must fully and clearly authorize such interpretation.<sup>2</sup> Technical words must be given their legal effect, unless it is clear that they were not used in their proper sense.<sup>3</sup>

The word "heirs" was held to mean "children" where the deed was to a married woman and the heirs of her husband by her, both husband and wife being alive at the time of the execution of the deed. The conveyance was to the woman and her children as tenants in common in equal shares. The estate passed directly out of the grantor to the designated grantees.<sup>4</sup>

<sup>1</sup> *Anderson v. Logan*, 105 N. C. 266, 270, 11 S. E. Rep. 361, per Avery, J. The following cases fall under this principle: *Staton v. Mullis*, 92 N. C. 623; *Graybeal v. Davis*, 95 N. C. 508; *Hicks v. Bullock*, 96 N. C. 164, 1 S. E. Rep. 629; *Bunn v. Wells*, 94 N. C. 67; *Ricks v. Pulliam*, 94 N. C. 225; *Phillips v. Thompson*, 73 N. C. 543; *Waugh v. Miller*, 75 N. C. 127; *Allen v. Bowen*, 74 N. C. 155; *Phillips v. Davis*, 69 N. C. 117; *Mitchell v. Mitchell*, 108 N. C. 542, 13 S. E. Rep. 187; *Winborne v. Downing*, 105 N. C. 20, 10 S. E. Rep. 888; *Vickers v. Leigh*, 104 N. C. 248, 257, 10 S. E. Rep. 308. Several of these cases related to deeds executed before the act of 1879 dispensing with the necessity for the use of the word "heirs." A deed in which the word "heirs" does not appear in any part, except in connection with the name of the bargainor, or with some expression such as "party of the first part," used in the clause of warranty or elsewhere to designate the grantor, vests only a life estate

in the bargainee. *Batchelor v. Whitaker*, 88 N. C. 350; *Stell v. Barham*, 87 N. C. 62; *Anderson v. Logan*, 105 N. C. 266, 271, 11 S. E. Rep. 361.

<sup>2</sup> *Pritchard v. James*, 93 Ky. 306, 20 S. W. Rep. 216; *Mitchell v. Simpson*, 88 Ky. 125, 10 S. W. Rep. 372; *Griswold v. Hicks*, 132 Ill. 494, 24 N. E. Rep. 63; *Carpenter v. Van Olinder*, 127 Ill. 42, 19 N. E. Rep. 868; *Ridgeway v. Lanphear*, 99 Ind. 251; *Shimer v. Mann*, 99 Ind. 190, 50 Am. Rep. 82; *Allen v. Craft*, 109 Ind. 476, 9 N. E. Rep. 919, 58 Am. Rep. 425; *Taney v. Fahnley*, 126 Ind. 88, 25 N. E. Rep. 882; *Watrous v. Allen*, 57 Mich. 362, 24 N. W. Rep. 104, 58 Am. Rep. 363; *Warn v. Brown*, 102 Pa. St. 347; *Tyler v. Moore*, 42 Pa. St. 374, 389, per Strong, J.; *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *Taylor v. Cleary*, 29 Gratt. 448.

<sup>3</sup> *Jesson v. Wright*, 2 Bligh, 156, per Lord Redesdale; *Doe v. Gallini*, 5 Barn. & Adol. 621.

<sup>4</sup> *Tinder v. Tinder*, 131 Ind. 381, 30 N.

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While the word "children" used in the habendum may be held to mean "heirs," if such was the evident intention of the grantor, yet, if the children are specified by name, any inference that the term was used to designate the persons who might be the grantee's heirs at his death is clearly excluded, for at that time the children mentioned might not be living, and other children might be born to him who would be his heirs at his death.<sup>1</sup>

584. A deed to a woman "and her heirs" does not pass any title to the heirs. There is no sufficient indication that the word "heirs" was used in the sense of "children," and the word must be given its usual interpretation as a word of limitation.<sup>2</sup> And so a deed to a woman and "her bodily heirs" vests in her an estate in fee where it does not appear from the whole instrument that such words were used in the sense of "children."<sup>3</sup>

585. In a deed to one and "his present heirs" the word "heirs" is not employed in a technical signification, but as words of purchase. The deed does not vest an estate in fee in the grantee, but vests an estate in the grantee and his heirs-apparent as tenants in common.<sup>4</sup> A conveyance to the heirs of a person living, and having children in being at the time, vests the title in such children to the exclusion of children subsequently born.<sup>5</sup>

By statute in North Carolina a limitation to the heirs of a living person is to be construed as a limitation to the children of such person, unless a contrary intention appears.<sup>6</sup>

586. If the "heirs" referred to in the habendum are not

E. Rep. 1077. And see *Fountain County Coal Co. v. Beckleheimer*, 102 Ind. 76, 1 N. E. Rep. 202, 52 Am. Rep. 645; *Tharp v. Yarbrough*, 79 Ga. 382, 4 S. E. Rep. 915, 11 Am. St. Rep. 439; *Tucker v. Tucker*, 78 Ky. 503; *Brann v. Elzey*, 83 Ky. 440; *Stamper v. Armstrong* (Ky.), 15 S. W. Rep. 513; *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. Rep. 904; *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. Rep. 959; *Heard v. Horton*, 1 Denio, 165, 43 Am. Dec. 659.

<sup>1</sup> *Brasington v. Hanson*, 149 Pa. St. 289, 24 Atl. Rep. 344; *Rupert v. Penner*, 35 Neb. 587, 601, 53 N. W. Rep. 598.

<sup>2</sup> *Pritchard v. James*, 93 Ky. 306, 20 S. W. Rep. 216.

<sup>3</sup> *Lanham v. Wilson* (Ky.), 22 S. W. Rep. 438; *Short v. Terry* (Ky.), 22 S. W. Rep. 841. In this case it was said that the repetition of the expression "heirs of the body," in the covenants of the deed, does not change the meaning of the instrument.

<sup>4</sup> *Fountain County Coal Co. v. Beckleheimer*, 102 Ind. 76, 1 N. W. Rep. 202, 52 Am. Rep. 645; *Chess-Carley Co. v. Purtell*, 74 Ga. 467.

<sup>5</sup> *Tharp v. Yarbrough*, 79 Ga. 382, 4 S. E. Rep. 915; *Heard v. Horton*, 1 Denio, 165, 43 Am. Dec. 659.

<sup>6</sup> Code 1883, § 1329; *Jarvis v. Davis*, 99 N. C. 37, 5 S. E. Rep. 227.

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the heirs of the grantee, the word is one of purchase. Thus, where a deed is made to a married woman and the heirs of her husband, the word "heirs" is synonymous with "children," and an absolute estate vests *in presenti* in the grantee and the children then living of her husband.<sup>1</sup>

587. In case a deed contains a reference to some other instrument which contains a limitation to heirs, and conveys the same estate as therein, the deed may pass a fee simple without the use of the word "heirs" in express terms. "Words of direct and immediate reference will suffice. The word 'heirs' or 'successors' need not be in the identical deed of grant, or other mode of assurance by which the estate is granted or conveyed. Thus, when one to whom lands have been granted in fee, after reciting the grant, or without any recital, grants the lands to another as fully as they were granted to him, or where a man grants two acres to A and B, to hold one acre to A and his heirs, and the other acre to B, in form aforesaid,"<sup>2</sup> the fee will pass.

A deed which, after referring to the conveyance to the grantor, conveyed "all the grantor's estate, right, title, interest, term of years to come, property, claim, and demand, both in law and in equity," conveys the property as fully as it was conveyed to the grantor, and as the conveyance to the grantor gave him the estate in fee, the grantor's conveyance vests the fee, even though the word "heirs" does not appear in the deed.<sup>3</sup>

But a deed by a distributee of an intestate estate of all his interest in the estate, without words of inheritance, conveys only a life interest, the fee remaining in the distributee.<sup>4</sup>

<sup>1</sup> Tucker v. Tucker, 78 Ky. 503.

<sup>2</sup> Preston on Estates, vol. 2, p. 2; Co. Litt. 9 b; Mercier v. Missouri River, &c. R. Co. 54 Mo. 506; Hofsass v. Mann, 74 Md. 400, 22 Atl. Rep. 65; Lytle v. Lytle, 10 Watts, 259; Lemon v. Graham, 131 Pa. St. 447, 19 Atl. Rep. 48, 25 W. N. C. 339. Per Williams, J.: "Where technical words are supplied by reference to another instrument which contains them, the case was recognized as an exception as early as the days of Lord Coke; and this exception was recognized by our own case of Lytle v. Lytle, 10 Watts, 259, and followed. The rule was plainly laid down

in the last case cited that a fee simple may be created in Pennsylvania, by deed without words of inheritance, by a reference to another instrument in which such words are found; and it was made clear that such was the rule in England at a very early date." And see examples from Sheppard's Touchstone, 101.

In Reaume v. Chambers, 22 Mo. 36, and Lytle v. Lytle, 10 Watts, 259, the reference to the other instrument was insufficient to create an estate in fee.

<sup>3</sup> Brady v. Evans (Md.), 28 Atl. Rep. 1061.

<sup>4</sup> Lorick v. McCreery, 20 S. C. 424.

588. A release by one of several joint tenants seised in fee simple may be made without words of inheritance.<sup>1</sup> The release is regarded as simply extinguishing the right or interest of the releasor, leaving the others as sole owners.

589. An indorsement placed by the grantee upon a deed which conveys to him an estate in fee simple may be sufficient to transfer such an estate without words of inheritance in the indorsement; as where a grantor placed upon the back of such a deed an assignment, under his hand and seal, of all his right, title, and interest "in and to the within deed," and delivered the deed so indorsed under circumstances indicating an intention to transfer a fee simple estate in the land described.<sup>2</sup>

But other and perhaps the more consistent authorities hold that the effect of such an indorsement is at most to pass an equitable title only.<sup>3</sup>

590. A deed to a person without words of limitation, but with an unlimited power of disposal, vests in him an absolute fee.<sup>4</sup>

But a conveyance to one for life, with a power of appointment at his decease in fee, is not enlarged by the power to an estate in fee.<sup>5</sup>

A power of sale in a mortgage without words of inheritance does not operate to give the mortgagee an estate in fee, at least before the power is executed.<sup>6</sup>

But the mere fact, that the permanent and exclusive use of land

<sup>1</sup> Co. Litt. 9 b.

<sup>2</sup> *Lemon v. Graham*, 131 Pa. St. 447, 454, 19 Atl. Rep. 48, 25 W. N. C. 339. Williams, J., in the last-named case, speaking of the assignor, said: "He transferred his whole estate, as vested in him by virtue of the deed, by the reference to its terms in the assignment. He said, in substance and in legal effect, 'as fully as the within deed clothes me with the title to the land described in it, so fully and completely do I transfer the same land to my son Allen. He is to take from me the title which I took from my grantor.' The technical words that are wanting in the assignment, standing by itself, are thus supplied by the refer-

ence to 'the within deed' for a description of the estate; and the fee simple which the father took by the deed from John he transfers by his assignment to Allen." See, also, *Harlowe v. Hudgins*, 84 Tex. 107, 19 S. W. Rep. 364.

<sup>3</sup> *Dupont v. Wertheman*, 10 Cal. 354; *Porter v. Read*, 19 Me. 363; *Reaume v. Chambers*, 22 Mo. 36.

<sup>4</sup> *Jackson v. Robins*, 16 Johns. 537; *Cook v. Walker*, 15 Ga. 457; *Green v. Sutton*, 50 Mo. 186; *Pollard v. Union Nat. Bank*, 4 Mo. App. 408; *Tremmel v. Kleiboldt*, 6 Mo. App. 549.

<sup>5</sup> *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. Rep. 918.

<sup>6</sup> *Sedgwick v. Laffin*, 10 Allen, 430.



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is essential to the enjoyment of a right granted therein, is not sufficient to make it operate as a conveyance in fee.<sup>1</sup>

591. Parol evidence is not admissible to show that a deed to a person without words of inheritance was intended to convey an estate in fee, where there is no ambiguity in the terms. Thus, it cannot be shown that a deed which recites merely that the grantor assigns all his present interest, and all that he may hereafter acquire, in the estate of his father, was intended to convey anything more than a life estate to the grantee.<sup>2</sup>

592. The word "assigns" is without legal effect in a limitation to one "and his heirs," though it is customary to add the words "and assigns forever." These words add nothing to the legal effect of the instrument, and are in fact superfluous.<sup>3</sup> A grant to one and his heirs carries with it the estate to his assigns by operation of law.<sup>4</sup>

593. There is an exception to the rule that the word "heirs" is necessary to create a fee in case of a trust. Where upon the face of the deed it appears that the conveyance is in trust for a use, the full performance of which requires or may possibly require the vesting of a fee in the trustee, he is held to take an estate in fee simple without the use of the word "heirs" as a word of limitation upon the estate conveyed.<sup>5</sup> Thus, a deed to trustees and their successors in trust to sell and convey in fee simple absolute, without the word "heirs" in either the habendum or granting clause, conveys to the trustees an estate in fee simple.

<sup>1</sup> *Munro v. Meech*, 94 Mich. 596, 54 N. W. Rep. 290.

<sup>2</sup> *Jones v. Swearingen* (S. C.), 19 S. E. Rep. 947.

<sup>3</sup> *Brookman v. Smith*, L. R. 6 Exch. 291, 306, affirmed L. R. 7 Exch. 271.

<sup>4</sup> *Brasington v. Hanson*, 149 Pa. St. 289, 24 Atl. Rep. 344.

<sup>5</sup> *Perry on Trusts*, §§ 312-320; *Oates v. Cooke*, 3 Burr. 1684; *Villiers v. Villiers*, 2 Atk. 72; *Neilson v. Lagow*, 12 How. 98; *Webster v. Cooper*, 14 How. 488, 499; *Poor v. Considine*, 6 Wall. 458, 471; *Ward v. Amory*, 1 Curtis, 419; *Young v. Mahoning Co.* 53 Fed. Rep. 895; *Mackall v. Richards*, 1 Mack. 444; *King v. Parker*, 9 Cush. 71; *Brooks v. Jones*, 11 Met. 191; *Gould v. Lamb*, 11 Met. 84,

45 Am. Dec. 187; *Stearns v. Palmer*, 10 Met. 32; *Newhall v. Wheeler*, 7 Mass. 189; *Cleveland v. Hallett*, 6 Cush. 403; *Sears v. Russell*, 8 Gray, 86; *Attorney-General v. Proprietors of Federal St. Meeting-House*, 3 Gray, 1; *Fisher v. Fields*, 10 Johns. 495, 505, per Kent, Ch.; *Welch v. Allen*, 21 Wend. 147; *Hawley v. James*, 5 Paige, 318; *Kirkland v. Cox*, 94 Ill. 400; *Preachers' Aid Society v. England*, 106 Ill. 125; *North v. Philbrook*, 34 Me. 532; *Merritt v. Disney*, 48 Md. 344; *Farquharson v. Eichelberger*, 15 Md. 63, 72; *Hawkins v. Chapman*, 36 Md. 83; *Spessard v. Rohrer*, 9 Gill, 261; *Ewing v. Shannahan*, 113 Mo. 188, 20 S. W. Rep. 1065; *Wilcox v. Wheeler*, 47 N. H. 488.

The trust required an estate in fee simple for its execution, and consequently a legal estate commensurate with this requirement; and therefore the trustees took such an estate without the use of the usual words of limitation.<sup>1</sup> In like manner, where a city conveyed land to a building committee, omitting words of limitation, empowering them either to sell and convey the land in fee simple to a purchaser, or to exchange for other land, or to use it for the erection of a court-house, and then donate it to the county commissioners, it was held that such deed conveyed a title commensurate with the purposes of the trust, namely, a fee simple.<sup>2</sup>

A conveyance to a trustee will give him a legal estate in fee if the trust limited upon it be to the *cestui que trust* and his heirs; for, though the words of inheritance in such case are connected with the estate of the *cestui que trust*, they will be held to relate to the legal estate of the trustee, in order to give effect to the intention of the parties.<sup>3</sup>

A conveyance to a trustee, without words of inheritance, to permit the grantor's grandchildren to take the rents and profits, does not convey a fee. The court will not presume that a fee was intended in the absence of evidence to show that such an estate was necessary to effectuate the purposes of the trust.<sup>4</sup>

**594. Words of inheritance are not necessary in an agreement** showing that one who has taken the title to certain property holds the same, or some interest in it, for the benefit of another who advanced the purchase-money. In a suit by the executor of the party who had made the advances to recover one half of the net profits of a sale of the property, it was contended that the agreement gave him only a life estate, inasmuch as the agreement made no mention of his heirs; but the court held that the absence of the word "heirs" did not limit his interest to a life estate merely, Mr. Justice Holmes saying: "We may add that, in a case of this kind, we should go no further than we were compelled to go, by binding authority, in defeating the plainly expressed meaning of the instrument, for want of a technicality

<sup>1</sup> Neilson v. Lagow, 12 How. 98, 110; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. Rep. 1065; Cleveland v. Hallett, 6 Cush. 403; Gould v. Lamb, 11 Met. 84, 45 Am. Dec. 187; North v. Philbrook, 34 Me. 532; Angell v. Rosenbury, 12 Mich. 241.

<sup>2</sup> Young v. Mahoning Co. 53 Fed. Rep. 895.

<sup>3</sup> Melick v. Pidcock, 44 N. J. Eq. 525, 15 Atl. Rep. 3; Stearns v. Palmer, 10 Met. 32.

<sup>4</sup> Daly v. Bernstein (N. M.), 28 Pac. Rep. 764. And see Kearney v. Maccomb, 16 N. J. Eq. 189.

which has been done away with altogether in many jurisdictions, and which would be simply vexatious if applied to a memorandum like this." <sup>1</sup>

595. An equitable estate may have the character of inheritability though the word "heirs" is not used in declaring the trust, provided it appears from the context that such was the clear intention of the party declaring the trust. This is an instance where courts of chancery do not adopt the same rules of construction that prevail in courts of law. If the meaning of the grantor is clear that he intended the beneficiary under the trust should have an estate in fee, he will take such an estate, though technical terms of the common law used in the limitation of such an estate have been disregarded; so that the beneficiary may have an equitable fee without the word "heirs," and an equitable entail without the words "heirs of the body." <sup>2</sup>

Ordinarily, an equitable estate in fee is subject to the same incidents which attach to a legal estate in fee, and, generally speaking, these include the right to dispose of the estate by alienation as well as by devise.<sup>3</sup> If a deed in trust declares the trust to be for a person named "and his heirs," the beneficiary takes an equitable estate in fee simple which he may devise, the word "heirs" being a word of limitation.<sup>4</sup>

But an equitable estate created by the premises cannot be enlarged to an estate in fee by a limitation to heirs in the habendum.

<sup>1</sup> *Dorr v. Clapp*, 160 Mass. 538, 36 N. E. Rep. 474. "This is not the case of a formal conveyance creating a trust, as in *McElroy v. McElroy*, 113 Mass. 509. It is a memorandum of a bargain previously made, and is put in writing to satisfy the statute (Pub. St. ch. 141, § 1) and to furnish evidence. This is apparent on the face of the writing. It is agreed that the equity in the real estate is, as well as that it shall be, owned by Clapp and Russ in equal shares; and a reason is stated which, even if not true or binding in such a sense as to show a resulting trust, shows a consideration, goes back to the beginning of the transaction, and imports that the understanding as to ownership dates from then. If the parol evidence be considered, as it seems to have been in *Urann v. Coates*, 109 Mass. 581, 584, it leads to the

same conclusion. The purport of the agreement, as applied to the present state of facts, a sale having taken place, is similar to that of the one construed and held sufficient in *Urann v. Coates*. In the latter, heirs were not mentioned. See, also, *Barrell v. Joy*, 16 Mass. 221, 223; *Arms v. Ashley*, 4 Pick. 71; *Scituate v. Hanover*, 16 Pick. 222; *Fisher v. Fields*, 10 Johns. 495; *Wright v. Douglass*, 7 N. Y. 564; *Loring v. Palmer*, 118 U. S. 321, 6 Sup. Ct. Rep. 1073; *Lewin, Trusts* (9th ed.), 54, 55."

<sup>2</sup> *Lewin on Trusts*, 44; *Holmes v. Holmes*, 86 N. C. 205.

<sup>3</sup> *Lewin, Trusts*, 692; *Story Eq. Jur.* § 974; *Ropes v. Upton*, 125 Mass. 258; *Gunn v. Brown* (Md.), 23 Atl. Rep. 462.

<sup>4</sup> *Knowlden v. Leavitt*, 121 Mass. 307.

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dum.<sup>1</sup> Thus, where a conveyance was made to the trustees of a voluntary association, "in trust for the stockholders of said association," to have and to hold "to the said stockholders, their heirs and assigns," it was held to give to the stockholders an equitable and not a legal estate.<sup>2</sup>

596. A sale by an officer of the law under an order of court may operate to pass an estate in fee without the use of the word "heirs;" as where a sheriff, on an execution sale of real estate owned by the judgment debtor in fee, executes to the purchaser at such sale a deed of "all the estate, title, and interest" which the judgment debtor had in such land, the deed passes a fee in the land, though the word "heirs" is omitted. The sheriff had no authority to sell less than the debtor's entire estate, which was an estate in fee.<sup>3</sup>

597. There is an exception to the rule in case of a grant to a corporation sole; "for if lands be given to a sole body politic or corporate, as to a bishop, vicar, master of a hospital, etc., there, to give him an estate of inheritance in his politic or corporate capacity, he must have these words, 'to have and to hold to him and his successors;' for without these words . . . there passeth no inheritance; for, as the heir doth inherit to the ancestor, so the successor doth succeed to the predecessor."<sup>4</sup>

598. A deed to a corporation aggregate conveys a fee simple estate, though it does not contain words of limitation or succession.<sup>5</sup> "In strictness, while a corporation sole has successors, a corporation aggregate has none, for it continues to exist, one and the same, as the river retains its identity while the currents of water that form it are continually flowing in and passing out. There is a succession among the constituent members, but none in the corporation itself."<sup>6</sup>

599. The deed may be reformed in equity in case the words of inheritance are omitted by mistake, contrary to the intention

<sup>1</sup> *Hastings v. Merriam*, 117 Mass. 245; *N. H.* 488; *Olcott v. Gabert*, 86 Tex. 121, 23 S. W. Rep. 985.

*Gray*, 580.

<sup>2</sup> *Chapin v. First Universalist Society*, 8 Gray, 580.

<sup>3</sup> *Carolina Sav. Bank v. McMahon*, 37 S. C. 309, 16 S. E. Rep. 31.

<sup>4</sup> *Co. Litt.* 8 b, 94 b; *Overseers v. Sears*, 22 Pick. 122, 126; *Wilcox v. Wheeler*, 47

<sup>5</sup> *Wilkes Barre v. Wyoming Hist. Society*, 134 Pa. St. 616, 19 Atl. Rep. 809; *Wilcox v. Wheeler*, 47 N. H. 488; *Chancellor v. Bell*, 45 N. J. Eq. 538, 541.

<sup>6</sup> *Asheville Division v. Aston*, 92 N. C. 578, 584, per Smith, C. J.

of the parties.<sup>1</sup> The equitable power of reformation can be invoked only by pleading the mistake.<sup>2</sup> But the court is not warranted in decreeing the correction of a deed containing no words of inheritance, by a simple inspection of the deed, where there is nothing to indicate that they were omitted by mistake, or that the grantor intended to convey a fee, except the reservation of the possession during his lifetime.<sup>3</sup>

Where land was conveyed to several persons named as "trustees of the Methodist Church, . . . and their successors in office forever," without using the word "heirs," it was held that the intention to convey a fee simple was manifest, although the absence of the word "heirs" prevented a court of law from giving effect to it; that the intention to convey to the Methodist Church named, a regularly incorporated religious society, was quite clear; and that the heir at law of the grantor, having recovered in ejectment the land conveyed, should be perpetually enjoined from enforcing his judgment, although the conveyance was without other consideration than the attendance of the grantor upon the ministrations of the church.<sup>4</sup>

**600.** On the other hand, a deed in fee may be reformed so that it will pass only a life estate, as intended by the parties; as where a conveyance was made in fee, and at the same time the grantee executed and delivered to the grantor an instrument, not under seal, declaring the intention of the parties to be that the grantee should hold only a life estate, especially where the deed was made by a daughter to her mother without other consideration than filial affection. "It was intended by both parties to be restricted to a life estate. They adopted means supposed to be adequate to thus limit the operation of the deed. By their failure to comprehend the legal effect of the writing, the entire estate was legally conveyed. If that effect is to be given to the

<sup>1</sup> *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. Rep. 391; *Chancellor v. Bell*, 45 N. J. Eq. 538; *Weller v. Rolason*, 17 N. J. Eq. 13; *Wanner v. Sisson*, 29 N. J. Eq. 141, 147; *Rackley v. Chesnutt*, 110 N. C. 262, 14 S. E. Rep. 750; *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. Rep. 308; *Moore v. Quince*, 109 N. C. 85, 13 S. E. Rep. 872; *Saunders v. Saunders*, 108 N. C. 327, 12 S. E. Rep. 909. In these cases it

was manifest that the grantor could have had no other intention than to convey an estate in fee.

<sup>2</sup> *Anderson v. Logan*, 105 N. C. 266, 11 S. E. Rep. 361.

<sup>3</sup> *Ray v. Durham Co.* 110 N. C. 169, 14 S. E. Rep. 646.

<sup>4</sup> *Visitors M. E. Church v. Town*, 47 N. J. Eq. 400, 20 Atl. Rep. 488.

transaction it would operate as a fraud on the plaintiff, divesting her without consideration of the estate which both parties intended should remain in her. It may be said that the instruments were in the form intended, and that the mistake was only as to the legal effect. But even in such a case equity will grant relief under proper circumstances."<sup>1</sup>

#### IV. *The Rule in Shelley's Case.*

601. The rule in *Shelley's Case*<sup>2</sup> is this: Where a freehold estate is limited to one for life, and by the same instrument the inheritance is limited, either immediately or after another estate in freehold, to his heirs, or the heirs of his body, the whole estate vests in him, either in fee simple or in fee tail, in the same manner as if the estate had been given to him and his heirs, or to him and the heirs of his body; and the words "heirs" and "heirs of his body" are words of limitation and not of purchase.

This rule was an ancient dogma of the common law at the time of the decision from which the rule finally took its name, its origin having been traced by Justice Blackstone to a case decided in the reign of Edward II.<sup>3</sup> The earliest intelligible decision upon the subject, however, is to be found in the case of the Provost of Beverly, in the time of Edward III., and reported in the Year Books, in which the rule is substantially declared as in *Shelley's Case*.

The rule, though of feudal origin, has been repeatedly declared to be in accordance with the general policy of modern jurisprudence.<sup>4</sup> The reason for the rule in the first instance is undoubtedly the same as that which makes the word "heirs," when used in a conveyance, a word of limitation, giving an absolute estate in fee to the grantee. Professor Washburn clearly and forcibly states this view in his excellent treatise, saying: "It was at first understood that in case of such a limitation the estate was in fact

<sup>1</sup> *Scofield v. Quinn*, 54 Minn. 9, 55 N. W. Rep. 745. See, also, *Benson v. Markoe*, 37 Minn. 30, 33 N. W. Rep. 38. 882; *Hardage v. Stroope*, 58 Ark. 303, 307; *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. Rep. 979.

<sup>2</sup> 1 Coke, 88, 93 b. And see *Loring v. Eliot*, 16 Gray, 568, 572; *McIlhinny v. McIlhinny*, 137 Ind. 411, 37 N. E. Rep. 147, 148; *Andrews v. Spurlin*, 35 Ind. 262; *Doe v. Jackman*, 5 Ind. 283; *Taney v. Fahndley*, 126 Ind. 88, 25 N. E. Rep. 3 Perrin v. Blake, 4 Burrow, 279, 1 W. Bl. 672.

<sup>4</sup> *Perrin v. Blake*, 4 Burrow, 2579, 1 W. Bl. 672; *Starnes v. Hill*, 112 N. C. 1, 16 S. E. Rep. 1011, per Shepherd, C. J.

to go to the heirs of the grantee named; that, though he had a right to enjoy it during life, he had no right to cut off the descent by alienation; and that when, therefore, the word 'heirs,' in the progress of estates, came to be regarded as a mere term of limitation, giving the grantee a complete ownership, with an unrestricted right of alienation, it was not easy to distinguish between a case where the limitation was to one and his heirs, and that where it was to him for life, and after his death to his heirs; the effect at common law being the same in both forms of limitation."<sup>1</sup>

602. Whatever may have been the grounds of the rule in its origin, there was a reason for its preservation in modern times, after the feudal reason of the prevention of frauds upon the feudal lord had ceased to exist with the feudal system itself; "and that subsequent reason," says Fearne, "is the desire to facilitate alienation by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease."<sup>2</sup> Mr. Justice Blackstone also adopts the same view, saying that the reason for the preservation of the rule is "laid in a principle diametrically opposite to the genius of feudal institutions, namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor."<sup>3</sup>

In America the rule has been abrogated in many States,<sup>4</sup>—the

<sup>1</sup> 2 Washb. Real Prop. 647.

<sup>2</sup> Fearne, Rem. § 421.

<sup>3</sup> *Perrin v. Blake*, 4 Burrow, 2579, 1 W. Bl. 672. In *Polk v. Faris*, 9 Yerg. 209, 30 Am. Dec. 400, Reese, J., in vindication of the rule, says: "It is a rule or canon of property which, so far from being at war with the genius of our institutions, or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing, perhaps, to this circumstance, that the rule—a Gothic column found among the remains of feudality—has been preserved, in all its strength, to aid in sustaining the fabric of the modern social system." In *Hileman v. Bous-*

*laugh*, 13 Pa. St. 344, 53 Am. Dec. 474, Gibson, C. J., says: "Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. . . . It has other than feudal objects, to wit, the unfettering of estates by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it otherwise would be." See, also, *Hamner v. Smith*, 22 Ala. 433, per Chilton, C. J.

<sup>4</sup> *Alabama*: Code 1886, § 1829. It prevailed until the Code of 1852 became operative, January 17, 1853. *May v. Ritchie*, 65 Ala. 602; *Mason v. Pate*, 34 Ala. 379. *California*: Civ. Code, § 779; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. Rep. 1049; *Estate of Utz*, 43 Cal. 200. *Connecticut*: G. S. 1888, § 2953, stat. of 1821; *Leake v. Watson*, 60 Conn. 498, 511, 21 Atl.

first taker has a life estate only, and the heirs or heirs of the body of such person take the remainder as purchasers,—but remains a rule of property in the construction of both deeds and wills in several States.<sup>1</sup>

Rep. 1075; *Goodrich v. Lambert*, 10 Conn. 448. **Georgia**: The rule was abrogated when the Code of 1862 went into effect. Children take the remainder. Code 1882, §§ 2248, 2249, 2250. *Wilkerson v. Clark*, 80 Ga. 367, 7 S. E. Rep. 319; *Ewing v. Shropshire*, 80 Ga. 374, 7 S. E. Rep. 554; *Durant v. Muller*, 88 Ga. 251, 14 S. E. Rep. 612; *Smith v. Collins*, 90 Ga. 411, 17 S. E. Rep. 1013. **Idaho**: R. S. 1887, § 2855. **Kentucky**: Was never in force in this State. The statute declares the effect of a deed or devise on which the rule would operate to be, as above stated. G. S. 1894, § 2345. *Turman v. White*, 14 B. Mon. 560; *Brown v. Ferrell*, 83 Ky. 417; *Clay v. Chenault* (Ky.), 10 S. W. Rep. 650. **Maine**: R. S. 1883, ch. 73, § 6; *Read v. Fogg*, 60 Me. 479; *Read v. Hilton*, 68 Me. 139. **Massachusetts**: P. S. 1882, ch. 126, § 4. Abolished as to wills by Stat. 1791, ch. 60, § 3. As to deeds also. R. S. 1836, ch. 59, § 9; *Loring v. Eliot*, 16 Gray, 568, 572; *Putnam v. Gleason*, 99 Mass. 454. **Michigan**: *Howell's Annot. Stat.* 1882, § 5544; *Fraser v. Chene*, 2 Mich. 81. **Minnesota**: G. S. 1894, § 4389; *Whiting v. Whiting*, 42 Minn. 548, 550, 44 N. W. Rep. 1030. **Mississippi**: Annot. Code 1892, § 2446. **Missouri**: R. S. 1889, § 8838, first enacted in 1835; *Riggins v. McClellan*, 28 Mo. 23; *Tesson v. Newman*, 62 Mo. 198; *Muldrow v. White*, 67 Mo. 470; *Wommack v. Whitmore*, 58 Mo. 448; *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. Rep. 979; *Wood v. Kice*, 103 Mo. 329, 15 S. W. Rep. 623. **Montana**: Codes 1895, Civ. Code, § 1228. **New Mexico**: Comp. Laws 1884, § 1425. **New York**: R. S. 1889, p. 2433, § 28. Act took effect January 1, 1830. *Barber v. Cary*, 11 N. Y. 397; *Moore v. Littel*, 41 N. Y. 66, 40 Barb. 488; *Brown v. Lyon*, 6 N. Y. 420. **North Dakota**: Comp. Laws 1887, § 2752. **Oklahoma**: Comp. Stats. 1892, § 3716.

**South Dakota**: Comp. Laws 1887, § 2752. **Tennessee**: Code 1884, § 2814, first enacted in 1851–52; *Hurst v. Wilson*, 89 Tenn. 270, 14 S. W. Rep. 778. **Vermont**: The rule is in force only as one of construction and intention. *Smith v. Hastings*, 29 Vt. 240. **Virginia**: Code 1887, § 2423. So in Code 1850, p. 501, § 11. **West Virginia**: Code 1891, ch. 71, § 11. **Wisconsin**: Annot. Stats. 1889, § 2052.

<sup>1</sup> **Arkansas**: The rule in *Shelley's Case* is in force in this State, except in so far as it has been repealed by the statute abolishing fees tail. A conveyance of land to a grantee "for and during her natural life, and then to the heirs of her body in fee simple, and, if at her death there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State," comes within the rule in *Shelley's Case*, and vests an estate of inheritance in the grantee, so that she becomes seized of the land in fee simple. *Hardage v. Stroope*, 58 Ark. 303, 24 S. W. Rep. 490. **Illinois**: Except in case of estates tail. *Fowler v. Black*, 136 Ill. 363, 26 N. E. Rep. 596; *Riggin v. Love*, 72 Ill. 553; *Baker v. Scott*, 62 Ill. 86; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. Rep. 814; *Butler v. Hucatis*, 68 Ill. 594, 23 Am. Rep. 589; *Carpenter v. Van Olinder*, 127 Ill. 42, 19 N. E. Rep. 868. **Indiana**: *Lane v. Utz*, 130 Ind. 235, 29 N. E. Rep. 772; *Taney v. Fahnley*, 126 Ind. 88, 25 N. E. Rep. 882; *Earnhart v. Earnhart*, 127 Ind. 397, 26 N. E. Rep. 895, 22 Am. St. Rep. 652; *Jackson v. Jackson*, 127 Ind. 346, 26 N. E. Rep. 897; *Fountain County Coal Co. v. Beckleheimer*, 102 Ind. 76; *Shimer v. Mann*, 99 Ind. 190, 50 Am. Rep. 82; *King v. Rea*, 56 Ind. 1; *Andrews v. Spurlin*, 35 Ind. 262; *Siceloff v. Redman*, 26 Ind. 251; *Small v. Howland*, 14 Ind. 592; *Hull v. Beals*, 23 Ind. 25; *Doe v. Jackman*, 5 Ind.



§§ 603, 604.] THE HABENDUM, OR THE ESTATES CREATED.

In a few States the rule has been abrogated as to wills, but remains in force as a rule of property as to deeds.<sup>1</sup>

603. The rule applies to equitable as well as legal estates when the trust is executed and not executory.<sup>2</sup> If the trust is a passive one, requiring no active duties on the part of the trustee, as where it is for the use of a married woman for her life and after her decease to her heirs in fee, and in the mean time to permit her to receive for her own use the rents of the land, and no purpose can be subserved in keeping the declared trust alive, the Statute of Uses executes the trust, and the wife becomes seised under the rule in Shelley's Case of a legal estate in fee, with power to convey the same.<sup>3</sup>

604. The rule in Shelley's Case is an arbitrary one which does not regard the intention of the parties in any particular case. Indeed, the rule is enforced in many cases in which it

283. Iowa: *Brolia v. Marquis*, 80 Iowa, 49, 45 N. W. Rep. 395; *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. Rep. 90. Maryland: *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *Thomas v. Higgins*, 47 Md. 439. North Carolina: *Starnes v. Hill*, 112 N. C. 1, 16 S. E. Rep. 1011, holding that the rule is still in force, and not affected by the statute of 1854, § 5, ch. 43, of the Rev. Code, and § 1329 of the present Code. Pennsylvania: *Carson v. Fuhs*, 131 Pa. St. 256, 18 Atl. Rep. 1017, 25 W. N. C. 230; *Kleppner v. Lavery*, 70 Pa. St. 72; *Yarnall's App.* 70 Pa. St. 335; *Doebler's App.* 64 Pa. St. 9; *Daley v. Koons*, 90 Pa. St. 246. South Carolina: Act of 1853, 12 Stat. 298, has not abrogated the rule. *Carrigan v. Drake*, 36 S. C. 354, 366, 15 S. E. Rep. 339; *Fields v. Watson*, 23 S. C. 42.

<sup>1</sup> Kansas: G. S. 1889, § 7256. New Hampshire: P. S. 1891, § 8; *Cloutman v. Bailey*, 62 N. H. 44. New Jersey: Rev. 1877, p. 299, Descent, § 10; *Akers v. Akers*, 23 N. J. Eq. 26, 30. Rhode Island: P. S. 1882, ch. 182, § 2; *Cooper v. Cooper*, 6 R. I. 261. Ohio: R. S. 1892, § 5968; *Mack v. Champion*, 26 W. L. B. 113, 115, per Hunt, J.; *Connecticut Mutual Life Insurance Co. v. Skinner*, 4 Ohio C. C.

526; *Smith v. Hankins*, 27 Ohio St. 371; *Carter v. Reddish*, 32 Ohio St. 1. Oregon: 2 Annot. Stat. 1892, § 3093. Texas: The rule seems to be recognized as regards deeds. *Hancock v. Butler*, 21 Tex. 804; *Hawkins v. Lee*, 22 Tex. 544. But not as applied to wills. *Tendick v. Evetts*, 38 Tex. 275.

<sup>2</sup> *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. Rep. 339; *Carson v. Fuhs*, 131 Pa. St. 256, 18 Atl. Rep. 1017, 25 W. N. C. 230; *Starnes v. Hill*, 112 N. C. 1, 16 S. E. Rep. 1011; *Cannon v. Barry*, 59 Miss. 289; *Bullard v. Goffe*, 20 Pick. 252; *Loring v. Elliot*, 16 Gray, 568, 572; *Davis v. Hayden*, 9 Mass. 514; *Wayne v. Lawrence*, 58 Ga. 15.

<sup>3</sup> *Carson v. Fuhs*, 131 Pa. St. 256, 266, 18 Atl. Rep. 1017. Paxson, C. J., said: "The trustee in this case had no active duties to perform; it is a passive, dry trust, with no interest to guard, no rights to protect. In such case, the *cestui que trust* is entitled to a reconveyance of the legal title; equity will consider that done which ought to be done, and declare the legal title in Mrs. Hamilton. It then comes within the rule in Shelley's Case, and the life estate and remainder coalesce, the effect of which is to give the fee to Mrs. Hamilton."

directly interferes with either the presumed or declared intention of the parties that a life estate shall vest in the first taker with a remainder over to the heirs of his body. But if the rule in Shelley's Case is applicable, the question of intention is foreign to the construction of the deed.<sup>1</sup> "The rule in Shelley's Case was never a rule of intention or of construction to reach and carry out the settlor's intention, but has been defined, as it was established, as an absolute rule of property to obviate certain difficulties that would arise in relation to tenures, if certain persons to whom the property was limited were allowed to take as purchasers and not by descent."<sup>2</sup> It is not a rule of construction or interpretation, but a rule of property.<sup>3</sup>

605. This rule even overrides the expressed intention of the grantor that it shall not operate. Preston on Estates upon this point uses the following language: "Neither the express declaration, first, that the ancestor shall have an estate for his life and no longer; nor, secondly, that he shall have only an estate for life in the premises, and after his decease it shall go to his heirs of his body, and, in default of such heirs, vest in the person next in remainder, and that the ancestor shall have no power to defeat the intention of the testator; nor, thirdly, that the ancestor shall be tenant for his life and no longer, and that it shall not be in his power to sell, dispose, or make away with any part of the premises, — will change the word 'heirs' into words of purchase."<sup>4</sup>

<sup>1</sup> *McIlhinny v. McIlhinny*, 137 Ind. 411, 37 N. E. Rep. 147; *Ridgeway v. Lanphear*, 99 Ind. 251; *Shimer v. Mann*, 99 Ind. 190, 50 Am. Rep. 82; *Fowler v. Black*, 136 Ill. 363, 26 N. E. Rep. 596; *Carpenter v. Van Olinder*, 127 Ill. 42, 47, 19 N. E. Rep. 868; *Doebler's App.* 64 Pa. St. 9, per Sharswood, J.

In *Smith v. Collins*, 90 Ga. 411, 412, 17 S. E. Rep. 1013, Chief Justice Bleckley said: "In its substance the rule is not arbitrary, but logical and apparently necessary in any system of law which is self-consistent, for the distinction between descent and purchase is radical and fundamental; and while a group of individuals, though they be heirs of another, may take by purchase the same as those who are

not his heirs, yet they cannot as heirs take otherwise by descent; and, to take by descent at all, they must take from him whose heirs they are, and not from him who conveyed the property and nominated them to succeed in its ownership. It may be that the rule has often been misapplied, for it is a rule of law and not a rule of construction. It is not available to ascertain intention, but only to fix the consequences of a given intention after it has been ascertained."

<sup>2</sup> *Mack v. Champion*, 26 W. L. Bul. 113, 115, per Hunt, J.

<sup>3</sup> *Baker v. Scott*, 62 Ill. 86.

<sup>4</sup> 1 Preston on Estates, p. 365. And see *Taney v. Fahmley*, 126 Ind. 88, 25 N. E. Rep. 882; *Hochstedler v. Hochstedler*,

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The application of the rule to a conveyance by a father to his daughter, "and to the heirs of her body," is not affected by the fact that the conveyance was intended as a gift or advancement.<sup>1</sup>

The application of the rule is in no way affected by a declaration or recital after a habendum to one for life, and upon his death "to his heirs and assigns forever," that the true meaning of the deed is that the grantee is "to hold only during his natural life," and upon his death "said premises to be held in fee simple by his heirs and assigns forever." The grantee under the rule takes an estate in fee simple, and not merely for life.<sup>2</sup>

606. There is a distinction between deeds and wills in the application of the rule in *Shelley's Case*. As applied to wills the rule is not allowed to override the manifest and clearly expressed intention of the testator, but the intention will always be carried into effect if it can be ascertained. If the language of the will is such as to bring the case within the rule, full force and effect will be given to it; but if it clearly appears that the testator had a meaning and intention different from the rule, this will not be allowed to frustrate his intention. This distinction between deeds and wills in the application of the rule is in accordance with the general rule applicable to the construction of wills, that the intention of the testator shall so far as possible be observed.<sup>3</sup>

607. The rule applies only when the life estate is a vested freehold. A limitation to a married woman for life, and, in the event that her husband shall survive her, then to him for life, and after the termination of the life estates then to the heirs of the husband, gives to the latter a contingent remainder; and until the contingency of his survival of his wife happens, the rule in *Shelley's Case* cannot operate to vest in him an indefeasible fee; and until this contingency happens, the husband's heirs have a contingent remainder in fee, expectant upon the determination of the life estate of the wife, she surviving her said husband.<sup>4</sup>

It is sufficient that the freehold in the ancestor is implied, and not created in express terms.<sup>5</sup>

108 Ind. 506, 9 N. E. Rep. 467; *Shimer v. Mann*, 99 Ind. 190, 50 Am. Rep. 82.

<sup>1</sup> *Lane v. Utz*, 130 Ind. 235, 29 N. E. Rep. 772.

<sup>2</sup> *Fowler v. Black*, 136 Ill. 363, 26 N. E. Rep. 596.

<sup>3</sup> *Ridgeway v. Lanphear*, 99 Ind. 251; *McIlhinny v. McIlhinny*, 137 Ind. 411, 37 N. E. Rep. 147.

<sup>4</sup> *Starnes v. Hill*, 112 N. C. 1, 16 S. E. Rep. 1011.

<sup>5</sup> *Wills v. Palmer*, 5 Bur. 2615, 2 Bl. Rep. 687; *Pibus v. Mitford*, 1 Vent. 372.

**608.** The rule applies where the limitation is to one for life, and after his death to his heirs, or the heirs of his body. Such a limitation is the same in effect as a limitation simply to one and his heirs, or the heirs of his body. It applies where the limitation is to one for life, with remainder to another for life, or in tail, with remainder to the heirs, or heirs of the body of the first taker; he has a life estate in possession, and an estate in fee simple or fee tail in remainder, expectant on the life estate in the other person.<sup>1</sup> The rule applies though the remainder be contingent, as where the limitation is to one for life with remainder to another for life, with remainder, if the first-named tenant shall die before the second life tenant, to the heirs of the first named; for he takes, in addition to his life interest in possession, a contingent remainder in fee simple. The rule applies also where the particular estate is for the life of another.<sup>2</sup>

A conveyance to a woman "during the term of her natural life," and "to descend" to her heirs in equal portions, is governed by the rule in Shelley's Case, and the grantee takes an absolute title in fee. "The word 'descend,' as used in the deed, means to pass from the grantee to her heirs, and is to the same effect as if it read 'to her during her natural life and to her heirs.'"<sup>3</sup> The rule is the same in case the deed is to one for life, and at his decease "to go and pass to his heirs."<sup>4</sup>

The rule was applied where a husband conveyed to his wife "and her children and joint heirs with her and myself," and to two others named. The wife was the third wife of the grantor, by whom he had two children, and the others named were the children of the grantor by his second wife. It was held that under the rule in Shelley's Case the wife and the two other persons named in the deed took an estate in fee as tenants in common, and that the children of the wife took nothing.<sup>5</sup>

**609.** The word "heirs" is essential to justify the application of the rule, just as it is to create an ordinary estate in fee simple. Thus, the rule does not apply when the limitation is to such person or persons as would be entitled to take from the life

<sup>1</sup> Ferne, *Remainders*, 29; Edwards, *See, however, Tyler v. Moore*, 42 Pa. St. Prop. in Land, 2d ed. 378. 374, 17 Atl. Rep. 216.

<sup>2</sup> Ferne, *Remainders*, 31, 32.

<sup>3</sup> *Taney v. Fahnley*, 126 Ind. 88, 25 N. E. Rep. 882; *Andrews v. Spurlin*, 35 Ind. 262; *McQueen v. Logan*, 80 Ala. 304.

<sup>4</sup> *Connecticut Mutual Life Insurance Co. v. Skinner*, 4 Ohio C. C. 526.

<sup>5</sup> *Broliar v. Marquis*, 80 Iowa, 49, 45 N. W. Rep. 395.

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tenant by descent.<sup>1</sup> It does not apply when the word "issue" or the word "children" is used instead of "heirs."<sup>2</sup> It does not apply when the word "heirs," in the phrase "heirs of the body," is used in the sense of "children," and as a word of purchase.<sup>3</sup>

The rule simply acts upon the words of inheritance, and does not affect the rules for determining the quantity of the estate conveyed, whether a fee simple or a fee tail.<sup>4</sup> It does not affect the words of procreation in a fee tail.

The rule operates to enlarge the estate of the ancestor, whose heirs generally, or the heirs of whose body, are the objects of the limitation, and who can take by descent from him and not as purchasers under the deed. It therefore has no application when the deed is to the husband for his life and that of his wife, with contingent remainder to the heirs of the body of the wife who may survive them.<sup>5</sup> The heirs of the body of the wife may not be the heirs of the husband, and therefore the rule might not operate to enlarge the estate of the husband, the first taker. The rule does not apply unless an estate is limited to the heirs of the donee in tail. It does not apply unless it is limited to the heirs of the same person to whom the preceding estate is given; therefore it does not apply where the conveyance is to a woman for her life, and at her death to the children born of her body, to them and their heirs forever. The children in such case would take as purchasers.<sup>6</sup>

610. The rule does not apply where the word "heirs" is used to describe a class to take as purchasers, and not to describe persons who are to take simply as heirs general or special

<sup>1</sup> *Handy v. McKim*, 64 Md. 560, 572, 4 Atl. Rep. 125; *Hofsass v. Mann*, 74 Md. 400, 22 Atl. Rep. 65; *Hardage v. Stroope*, 58 Ark. 303.

<sup>2</sup> *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. Rep. 64; *Wilson v. McJunkin*, 11 Rich. Eq. 527; *Mellichamp v. Mellichamp*, 28 S. C. 125, 5 S. E. Rep. 333; *Myers v. Anderson*, 1 Strobb. Eq. 344, 47 Am. Dec. 537; *McIntyre v. McIntyre*, 16 S. C. 290; *Cannon v. Barry*, 59 Miss. 289; *Estate of Utz*, 43 Cal. 200. In Indiana, however, the rule applies where the limitation is to the "issue of the body" instead of "heirs of the body." *King v. Rea*, 56 Ind. 1; *Lane v. Utz*, 130 Ind. 235, 29 N. E. Rep. 772.

<sup>3</sup> *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. Rep. 339; *Tyler v. Moore*, 42 Pa. St. 374, 17 Atl. Rep. 216; *Jackson v. Jackson*, 127 Ind. 346, 26 N. E. Rep. 897; *Sorden v. Gatewood*, 1 Ind. 107; *Doe v. Jackman*, 5 Ind. 283; *Andrews v. Spurlin*, 35 Ind. 262, 267; *Owen v. Cooper*, 46 Ind. 524.

<sup>4</sup> *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. Rep. 505; *Fields v. Watson*, 23 S. C. 42, 47.

<sup>5</sup> *Williamson v. Mason*, 23 Ala. 488.

<sup>6</sup> *Smith v. Collins*, 90 Ga. 411, 17 S. E. Rep. 1013.

of the grantee.<sup>1</sup> Thus the rule does not apply where the limitation is to the "present heirs," or the "heirs now living," of the grantee, or his "apparent heirs."<sup>2</sup>

It was held not to apply where the deed was to a woman to hold during her natural life, "and after her death to be equally divided between the lawful heirs of her body." These words were construed to be words of purchase and not of limitation.<sup>3</sup>

"The underlying question in all controversies, when it is contended that the rule in Shelley's Case applies, is, are the words 'heirs,' 'heirs of the body,' or 'issue,' to be construed as words of limitation or words of purchase? If the former, the rule of Shelley's Case applies, denying any estate to the 'issue,' 'heirs of the body,' but enlarging the estate of the life tenant to a fee simple or fee conditional, as the case may be."<sup>4</sup> The technical words of limitation may be explained by words added thereto which show that the words of limitation were not used in their technical sense, but as words of purchase.<sup>5</sup>

A conveyance to the grantor's children named, "and the heirs of their bodies," contained after the words of grant the following clause: "Meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children; should they die without issue, to their legal representatives." The habendum was to their heirs and assigns forever. It was held that the word "heirs" in the habendum clause meant the children of the grantees, and that the children of the grantor took only a life estate, and their children took the remainder in fee.<sup>6</sup>

The rule does not apply where the limitation is to the heirs or issue of the first taker *and their heirs*, for in such case there is

<sup>1</sup> Williamson v. Mason, 23 Ala. 488; 50 Am. Rep. 82; Fountain County Coal Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. Rep. 202, 52 Am. Rep. 645; Carpenter v. Scott, 62 Ill. 86.

<sup>2</sup> Fountain County Coal Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. Rep. 202, 52 Am. Rep. 645.

<sup>3</sup> Fields v. Watson, 23 S. C. 42. See, however, Moore v. Brooks, 12 Gratt. 135.

<sup>4</sup> Carrigan v. Drake, 36 S. C. 354, 366, 15 S. E. Rep. 339; McCown v. King, 23 S. C. 232; Shimer v. Mann, 99 Ind. 190,

<sup>5</sup> Fountain County Coal Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. Rep. 202, 52 Am. Rep. 645; Blake v. Stone, 27 Vt. 475.

<sup>6</sup> Griswold v. Hicks, 132 Ill. 494, 24 N. E. Rep. 63.

evinced a purpose to create in the heirs of the first taker an estate in fee simple.<sup>1</sup>

The rule does not apply where there is no precedent estate for life to the first taker, as where the conveyance was to a person "for the benefit of the heirs of his body."<sup>2</sup>

It applies only where the freehold estate to the first taker and the remainder to his heirs, or the heirs of his body, are created by the same instrument.<sup>3</sup>

### V. *Estates Tail.*

611. An estate tail is an estate of inheritance limited, not to the grantee's heirs in general, but to heirs of his body. To create an estate in tail it is essential to use not merely the word "heirs," but some word indicating the body from which the heirs are to come, or some word of procreation from a particular person.<sup>4</sup> While the words of limitation generally used are "heirs of his body," other equivalent words, which clearly make the limitation to the heirs of the body of the grantee, are sufficient. When the grantee in tail is alone mentioned as the person from whose body the heirs are to be derived, the estate is in tail general. When both the parents from whose bodies the heirs must be derived are specified, as where the grant is to one and the heirs of his body by a woman named, the estate is a tail special. The estate may be confined to heirs male or heirs female, and then the descent must be traced through heirs male in the one case, or heirs female in the other, and the estate is in tail male or tail female.

At the common law, before the statute of Westminster<sup>5</sup> known as *de donis conditionalibus*, such an estate was one in fee simple on condition that the grantee should have issue of the specified class. When this condition was fulfilled the estate became a fee simple, discharged of the condition, so that the donee might freely convey the land.<sup>6</sup> The statute ordained that "the will of a donor, according to the form of the deed of gift manifestly expressed, be henceforth observed; so that they to whom a tenement was given

<sup>1</sup> McIntyre v. McIntyre, 16 S. C. 290; Lemacks v. Glover, 1 Rich. Eq. 141; Dott v. Cunningham, 1 Bay, 453; Myers v. Anderson, 1 Strobh. Eq. 344, 346, 47 Am. Dec. 537; Fields v. Watson, 23 S. C. 42, 56, per McIver, J.

<sup>2</sup> McCown v. King, 23 S. C. 232.

<sup>3</sup> Cannon v. Barry, 59 Miss. 289.

<sup>4</sup> Adams v. Ross, 30 N. J. L. 505, 32 Am. Dec. 237.

<sup>5</sup> 13 Edw. I. 1285.

<sup>6</sup> § 154.

under such condition shall have no power to alien the teneiment so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the donor or his heirs, if issue fail, or there is no issue at all." The effect of the statute was, not to create a new estate, but to prevent the discharge of the condition by the donee's having issue of the prescribed class. The fee was preserved to such issue while there existed any to take it, and when there was a failure of such issue the reversion was secured to the donor.

**612.** An estate tail descends only to the heirs of the prescribed kind who issue from the body of the person to whom the estate is first granted, and it ceases when such heirs are extinct. The estate "lasts so long as there exists issue of the prescribed class; so long as there is, as it were, a stream flowing from the fountain."<sup>1</sup> On the failure of such issue the estate reverts to the original donor or his heirs, unless the entail has been barred in the manner provided by statute, or by a recovery at common law. This remedy for barring an entail, an invention of ecclesiastical subtlety, came into use about the beginning of the sixteenth century, and not only restored the power of alienation, but enabled the tenant in tail to prevent a reverter to the lord. By it an estate tail was converted into one in fee simple. While in theory an entail secures a succession in perpetuity to the oldest son, and to the oldest son of the oldest son,<sup>2</sup> in effect there is no such succession. Continuous entails ceased in England under the operation of recoveries at common law; and in this country, where they have not been wholly abolished by statute, under the operation of statutes enabling the tenant in tail to bar the entail by

<sup>1</sup> Goodeve's Real Prop. 3d ed. 58.

<sup>2</sup> *Wight v. Thayer*, 1 Gray, 284. In *Price v. Taylor*, 28 Pa. St. 95, 105, 106, Lowrie, J., said: "If it was an error to admit the eldest son as the heir to an estate tail general, under our law, it was perhaps an inevitable one, for, inheriting all our forms of wills and conveyances, and of legal practice, from England, we could not, if we would, at once build up a perfectly consistent system of legal principles founded on our new circumstances. . . . The reason why estates tail descended to the eldest son under our old

laws of descent was, because the descent of such estates was not provided for under our old statutes, and therefore the old common law alone furnished the rule for them. . . . The judicial adoption of the English law of primogeniture in estates tail has entirely ceased to have any support in our laws and customs, and is now plainly incompatible with them all. Therefore we can no longer presume, from general words of entailment, that a lineal descent according to the English law is intended."



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deed, continuous entails have ceased to exist. There may be temporary entailments where estates tail have not been converted into other estates by statute, but, owing to the facility with which they may be barred, they are seldom of long duration.

613. In the United States the statute *de donis* was recognized in the Colonies and original States as being in force,<sup>1</sup> except in South Carolina, where the fee conditional as at common law existed from the first.<sup>2</sup> There the heirs of the body take *per formam doni*, but subject to the debts of the first taker.<sup>3</sup>

Recoveries for barring entails were adopted in several of the colonies, and generally continued in use till more effectual remedies were secured by statute.<sup>4</sup>

But now in many States, by statute, estates tail have been converted into estates in fee simple.<sup>5</sup> In those States in which statutes in terms convert estates tail into estates in fee simple, the words of procreation used in deeds, which without the statute would have created estates tail, are to be wholly disregarded,

<sup>1</sup> *Allin v. Bunce*, 1 Root, 96; *Giddings v. Smith*, 15 Vt. 344, 350; *Hall v. Vandegrift*, 3 Binn. 374; *Pollock v. Speidel*, 17 Ohio St. 439, 447; *Corbin v. Healy*, 20 Pick. 514, 517.

<sup>2</sup> *Wright v. Herron*, 5 Rich. Eq. 441; *Murrell v. Mathews*, 2 Bay, 397; *Archer v. Ellison*, 28 S. C. 238, 5 S. E. Rep. 713.

<sup>3</sup> *Burnett v. Burnett*, 17 S. C. 545.

<sup>4</sup> *Jackson v. Van Zandt*, 12 Johns. 169; *Baker v. Mattocks*, Quincy (Mass.), 69; *Hawley v. Northampton*, 8 Mass. 3, 34; *Lyle v. Richards*, 9 S. & R. 322; *Den v. Smith*, 10 N. J. L. 39.

<sup>5</sup> *Alabama*: Code 1886, § 1825; *Martin v. McRee*, 30 Ala. 116; *Sullivan v. McLaughlin*, 99 Ala. 60, 11 So. Rep. 477. *California*: Civ. Code, § 763; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. Rep. 1049. *Florida*: R. S. 1892, § 1818. *Georgia*: Code 1882, § 2250; *Whitley v. Barker*, 79 Ga. 790, 4 S. E. Rep. 387, except where the term "heirs of the body" is used as a limitation over after the death of the first taker; *Wilkerson v. Clark*, 80 Ga. 367; *Ewing v. Shropshire*, 80 Ga. 374, 7 S. E. Rep. 554. *Indiana*: 2 R. S. 1894, § 3378; *McIlhinney v. McIlhinney*, 137 Ind. 411, 37 N. E. Rep. 147; *Allen v. Craft*, 109 Ind. 476, 9 N. E. Rep. 919, 58 Am. Rep. 425. *Kentucky*: G. L. 1894, § 2343; *McGennis v. McGennis* (Ky.), 29 S. W. Rep. 333; *Short v. Terry* (Ky.), 22 S. W. Rep. 841. *Michigan*: Annot. Stats. 1882, § 5519. *Minnesota*: G. S. 1894, § 4364. *Mississippi*: Annot. Code 1892, § 2436; *Jordan v. Roach*, 32 Miss. 481. *Montana*: Codes 1895; Civ. Code, § 1212. *New Hampshire*: Stat. of 1789; *Jewell v. Warner*, 35 N. H. 176; *Dennett v. Dennett*, 40 N. H. 498, 500, 43 N. H. 499. *New York*: R. S. 1889, p. 2431. *North Carolina*: Since January 1, 1877, Code 1883, § 1325. *North Dakota*: Comp. L. 1887, § 2736. *Oklahoma*: G. S. 1893, §§ 3700, 3701. *Pennsylvania*: Brightly's Purdon's Dig. 1894, p. 810, § 5, act of April 27, 1855. The effect of the act is to repeal the statute *de donis*, and to revive the common law as it previously existed. *Nicholson v. Bettie*, 57 Pa. St. 384; *Price v. Taylor*, 28 Pa. St. 95. *South Dakota*: Comp. L. 1887, § 2736. *Tennessee*: Code 1884, § 2813. *Virginia*: Code 1887, § 2421. *West Virginia*: Code 1891, ch. 71, § 9. *Wisconsin*: Annot. Stats. 1889, §§ 2027, 2028.

leaving the limitation simply to the heirs of the grantee and creating in him a fee simple.<sup>1</sup>

In several States the first donee in tail takes a life estate, and the heirs of the body of such donee take as purchasers, the remainder in fee simple.<sup>2</sup>

The statutes of several States enable the tenant in tail to bar the entail by a conveyance in fee simple.<sup>3</sup> The disentailing deed may be either a conveyance to a purchaser, or to a person to hold to the use of the tenant himself and his heirs as tenants in fee simple. Such deed may be either a warranty deed or a quitclaim. The estate may be taken for the debts of the tenant in tail in possession, either upon execution during his life, or sale by license of court after his death.<sup>4</sup>

**614.** To create an estate tail the word "heirs" is as essential as it is to create a fee simple.<sup>5</sup> In general no other word

<sup>1</sup> *Andrews v. Spurlin*, 35 Ind. 262; *Tipton v. La Rose*, 27 Ind. 484; *Kirk v. Furgerson*, 6 Cold. 479; *Singletary v. Hill*, 43 Tex. 588; *Tate v. Tally*, 3 Call, 354.

<sup>2</sup> *Arkansas*: Dig. of Stats. 1884, § 643. *Colorado*: Annot. Stats. 1891, § 432. *Connecticut*: G. S. 1888, § 2952. *Illinois*: R. S. 1889, ch. 30, § 6; *Lehndorf v. Cope*, 112 Ill. 317, 13 N. E. Rep. 505. *Missouri*: R. S. 1889, § 8838; *Farrar v. Christy*, 24 Mo. 453; *Phillips v. La Forge*, 89 Mo. 72; *Reed v. Lane*, 122 Mo. 311, 26 S. W. Rep. 957; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. Rep. 972; *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. Rep. 979; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. Rep. 796; *Wood v. Rice*, 103 Mo. 329, 15 S. W. Rep. 623; *Clarkson v. Clarkson* (Mo.), 28 S. W. Rep. 446. *New Jersey*: 1 R. S. 1877, p. 299, § 11, remainder to children. Statute passed in 1820. *Havens v. Seashore Land Co.* 47 N. J. Eq. 365, 368, 20 Atl. Rep. 497. *New Mexico*: Comp. L. 1884, § 1423, remainder to children. *Ohio*: R. S. 1892, § 4200, remainder to issue; *Pollock v. Speidel*, 17 Ohio St. 439. *Vermont*: G. S. 1880, § 1916; *Thompson v. Carl*, 51 Vt. 408.

<sup>3</sup> *Delaware*: R. Code 1893, p. 631, ch.

83, § 27. *Maine*: R. S. 1883, ch. 73, § 4; *Willey v. Haley*, 60 Me. 176. *Maryland*: Pub. G. L. 1888, art. 21, § 24. *Massachusetts*: P. S. 1882, ch. 120, § 15, act of March 8, 1792; *Williams v. Hichborn*, 4 Mass. 189; *Whittaker v. Whittaker*, 99 Mass. 364. *Rhode Island*: P. S. 1882, ch. 172, § 3; *Cooper v. Cooper*, 6 R. I. 261. In *Maine* and *Massachusetts*, where lands are held by one person for life, with vested remainder in tail in another, the tenant for life and remainder-man may bar the entail by a conveyance in fee simple. *Mass. P. S. ch. 120, § 16*; *Me. R. S. ch. 73, § 4*.

<sup>4</sup> *Coombs v. Anderson*, 138 Mass. 376; *Allen v. Ashley School Fund*, 102 Mass. 262, 265; *Cuffee v. Milk*, 10 Met. 366; *Williams v. Hichborn*, 4 Mass. 189; *Willey v. Haley*, 60 Me. 176.

<sup>5</sup> *Co. Litt.* 20 a; *Seagood v. Hone*, Cro. Car. 366; *Wheeler v. Duke*, 1 Cr. & M. 210; *Adams v. Ross*, 30 N. J. L. 505, 82 Am. Dec. 237; *Sharswood & Budd*, Lead. Cas. in Real Prop. 1; *Beecher v. Hicks*, 7 Lea, 207; *McIlhinney v. McIlhinney*, 137 Ind. 411, 37 N. E. Rep. 147; *Burns v. Weesner*, 134 Ind. 442, 34 N. E. Rep. 10; *King v. Rea*, 56 Ind. 1, modified; *Fletcher v. Fletcher*, 88 Ind. 418, overruled; *Bodine v. Arthur*, 91 Ky. 53, 14 S.

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can take its place.<sup>1</sup> Thus a grant to one and his children or offspring, or issue of his body, or to a man and his seed, or to a woman and the issue of her body, or to her and her children begotten of her present husband, creates an estate for life only, in the first taker, as the proper word of inheritance is wanting.

The expression "issue of the body" is not synonymous with "heirs of the body." The former expression embraces all descendants, and is applicable to them as well in the lifetime of the parent as after his death; while "heirs of the body" may embrace only a portion of the descendants, and does not embrace even them as long as the parent is living.<sup>2</sup>

In an instrument of entailment, the word "children" is rarely held synonymous with "heirs of the body."<sup>3</sup>

An equitable estate in fee tail arises where land is granted to a trustee for the use of a beneficiary and the heirs of his body.<sup>4</sup>

A limitation to the heirs of the body of one to whom no preceding estate is limited passes an estate tail in such heirs as donees; and the estate will descend as if the limitation had been to such person and the heirs of his body.<sup>5</sup> But a deed to the children of a person named, without adding "and their heirs," cannot operate to vest in them an estate in fee simple.<sup>6</sup>

**615. A deed to one and "the heirs of his body" creates an estate tail by force of the technical words used, unless there is something to show that "children" are meant by the phrase "heirs of his body."** These technical words must have their natural and ordinary signification, as words of limitation, unless there is something in the deed to make it clear that they are not used for the purpose of limitation, but to designate a class as purchasers.<sup>7</sup> The effect of the technical words "heirs of her body"

W. Rep. 904; *Bradford v. Griffin*, 40 S. C. 468, 19 S. E. Rep. 76; *May v. Ritchie*, 65 Ala. 602.

<sup>1</sup> Except by force of statute, as in England, where by the Law of Property Act of 1881, 44 & 45 Vict. ch. 41, § 51, the estate may be created by a limitation "in tail."

<sup>2</sup> *Bradford v. Griffin*, 40 S. C. 468, 19 S. E. Rep. 76, per Richardson, J.

<sup>3</sup> *Cannon v. Barry*, 59 Miss. 289, 300, per Chalmers, C. J.

<sup>4</sup> *Wood v. Kice*, 103 Mo. 329, 15 S. W.

Rep. 623; *Durant v. Muller*, 88 Ga. 251, 14 S. E. Rep. 612.

<sup>5</sup> *Co. Litt.* 26 b; *Moore v. Simkin*, 31 Ch. D. 95; *Fletcher v. Fletcher*, 88 Ind. 418.

<sup>6</sup> *Mattocks v. Brown*, 103 Pa. St. 16.

<sup>7</sup> *Slayton v. Blount*, 93 Ala. 575, 9 So. Rep. 241. "Unless the person named as ancestor is deceased at the date of the conveyance, or unless there are other expressions in the instrument descriptive of the persons intended to be named as grantees, the words 'heirs of the body' are too in-

cannot be controlled by evidence aliunde that the grantor did not intend to create an estate tail, but only a life estate in the grantee with remainder to her children. Evidence of his intention which does not appear in the deed itself cannot be considered.<sup>1</sup>

The phrase "lawful heirs of her body begotten" is, in legal effect, the precise equivalent of "heirs of her body." That the heirs are to be "lawful" and begotten adds nothing to the description, since to be heirs they must have both of these attributes.<sup>2</sup>

The addition of the word "assigns" to the words which create an estate in fee tail does not enlarge the estate granted to one in fee simple.<sup>3</sup>

**616.** An estate tail, so far as it depends upon the words "of his body," may be created by implication.<sup>4</sup> Thus, a grant to one and his heirs, and if he die without issue, or without heirs of his body, then over to another, creates an estate tail. The use of the word "issue" limits the generality of the term "heirs" to the heirs of the body of the grantee. Estates tail by implication are frequent in devises.<sup>5</sup> So a limitation in tail general may be restricted by the context to one in tail male.<sup>6</sup>

The body from which the heirs are to come need not be expressly mentioned, but it is sufficient to indicate it with reasonable certainty.<sup>7</sup>

The word "heirs" alone creates an estate in fee simple, and the words "male heirs" in a deed do not sufficiently indicate the

definite and uncertain to be operative as words of purchase." Per Walker, J.

<sup>1</sup> *Short v. Terry* (Ky.), 22 S. W. Rep. 841.

<sup>2</sup> *Ewing v. Shropshire*, 80 Ga. 374, 7 S. E. Rep. 554.

<sup>3</sup> *Pollock v. Speidel*, 17 Ohio St. 439.

<sup>4</sup> Co. Litt. 21 a; *Olivant v. Wright*, 9 Ch. D. 646; *Morgan v. Morgan*, L. R. 10 Eq. 99; *Fisher v. Wigg*, 1 P. Wms. 14; *Den v. Taylor*, 5 N. J. L. 413, 417; *Moore v. Rake*, 26 N. J. L. 574, 585; *Havens v. Seashore Land Co.* 47 N. J. Eq. 365, 20 Atl. Rep. 497; *Farrar v. Christy*, 24 Mo. 453; *Clarkson v. Clarkson* (Mo.), 28 S. W. Rep. 446; *Hollingsworth v. McDonald*, 2 Harr. & J. 230, 235, 3 Am. Dec. 545; *Handy v. McKim*, 64 Md. 560, 571, 4 Atl. Rep. 125.

<sup>5</sup> *Fahrney v. Holsinger*, 65 Pa. St. 388; *Shutt v. Rambo*, 57 Pa. St. 149.

<sup>6</sup> *Den v. Hobson*, 2 Bl. 695, 5 Burr. 2609.

<sup>7</sup> Estates tail were created in the following cases: To one "and his heirs lawfully begotten," *Barret v. Beckford*, 1 Ves. 521; *Hargrave*, note 121 to Co. Litt.; "and his lawfully begotten heir," *Hall v. Vandegrift*, 3 Binn. 374; "and the heir male of his body," *Manwaring v. Tabor*, 1 Root, 79; "and his bodily heirs," *Clarkson v. Clarkson* (Mo.), 28 S. W. Rep. 446; *Donnell v. Mateer*, 5 Ired. Eq. 7; *True v. Nicholls*, 2 Duv. (Ky.) 547; "and their heirs lawfully begotten of their bodies," *Johnson v. Johnson*, 2 Met (Ky.) 331; "and her body heirs," *McGinnis v. McGinnis* (Ky.), 29 S. W. Rep. 333; *Prescott v. Prescott*, 10 B. Mon. 56.

heirs of the body of the grantee, though in a will greater latitude is allowed in arriving at the intent of the testator. Therefore a grant to one for life, and to "his oldest male heir at the time of the decease" of such life tenant, does not create an estate tail in the first taker, but a life estate in him, with remainder in fee simple to his oldest male heir living at his decease.<sup>1</sup>

In a will, however, the words "male heirs" may be taken as equivalent to "male heirs of the body of the devisee."<sup>2</sup> So, also, a devise to a person and his "children," he having no children at the time, will be held, *prima facie*, to create in such devisee an estate tail.<sup>3</sup> In a will the word "issue" *prima facie* means "heirs of the body," and is a word of limitation and not of purchase, unless the intention as manifested by the whole will is that the word shall have a less extended meaning.<sup>4</sup>

617. The term "heirs of the body" may, however, be used to designate the children of the grantee, and in such case the children will take as purchasers, either in common with the parent, or in remainder after a life estate in the parent, in accordance with the intention of the grantor. "When it appears from the context that the words 'heirs' or 'heirs of the body' are intended to have a broader or more popular meaning than is accorded to them in technical usage, courts will lay hold of any expressions in the instrument indicative of such intention, and will give to the words the meaning which it appears they were intended to convey. Thus, where the phrases 'heirs of the body' and 'children' are used as synonymous, and it is clear that the technical phrase is not used for the purpose of limitation, but as a description of a class of persons, the ascertained intention of the maker of the instrument will prevail, the two phrases will be held to mean the same thing, and the words 'heirs of the body' will be given effect as words of purchase."<sup>5</sup> Thus, where a

<sup>1</sup> Smith v. Collins, 17 R. I. 432, 22 Atl. Rep. 1018.

<sup>2</sup> Roddy v. Fitzgerald, 6 H. L. Cas. 823; Cooper v. Cooper, 6 R. I. 261; Jillson v. Wilcox, 7 R. I. 515; Sutton v. Miles, 10 R. I. 348.

<sup>3</sup> Wild's Case, 6 Rep. 16 b; Clifford v. Koe, 5 App. Cas. 447.

<sup>4</sup> Parkhurst v. Harrower, 142 Pa. St. 432, 21 Atl. Rep. 826, 24 Am. St. Rep.

507; Shalters v. Ladd, 141 Pa. St. 349, 21 Atl. Rep. 596; Renoehl v. Shirk, 119 Pa. St. 108, 113.

<sup>5</sup> Slayton v. Blount, 93 Ala. 575, 9 So. Rep. 241. And see Darden v. Burns, 6 Ala. 362; Williams v. Graves, 17 Ala. 62; Warn v. Brown, 102 Pa. St. 347; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762.

father, "in consideration of my affections, and the further consideration of the support and well-being of my daughter and her children," made a deed to her "and to her bodily heirs, to have and to hold to her and her bodily heirs for their use and benefit forever," it was held that the deed vested the title in common in the daughter and her children.<sup>1</sup>

Where a deed to the grantor's children "and the heirs of their bodies" contained the further statement, "Meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children," it was held that this statement clearly showed that the word "heirs" was not used in its legal sense as a word of limitation, but as meaning children who would take the remainder, after the life estates, in fee.<sup>2</sup> "Whenever the words 'children' and 'heirs of the body' are indiscriminately used to designate remainder-men, they have been regarded as words of purchase designating a class of persons who were to take on the expiration of the particular estate, — not from the tenant of that estate, but from the donor, — a different intention not being clearly indicated."<sup>3</sup>

A conveyance to a woman for life, and after her death to be equally divided between the heirs of her body, does not create an estate tail, but a life estate in the woman with remainder to her children. The language indicates a division, and an equal

<sup>1</sup> *Wikle v. McGraw*, 91 Ala. 631, 8 So. Rep. 341. McClellan, J., delivering the judgment, said: "The considerations for the present deed are declared to be the grantor's 'affections' for and 'the support and well-being of' his daughter and her children. It is not reasonable to suppose that the grantor, moved solely by his affections for his daughter and her children, and evidencing, in his declaration of the motives which actuated him, his purpose to provide for her and their support and well-being, and no other purpose whatever, should nevertheless in the body of the deed not only have failed to make provision for the present support and well-being of his grandchildren, but, instead, undertook to make provision for distant

generations of their descendants, — a purpose in no wise foreshadowed in the premises of the instrument." Citing *Fellows v. Tann*, 9 Ala. 999; *Powell v. Glenn*, 21 Ala. 458; *Williams v. McConico*, 36 Ala. 22; *Robertson v. Johnston*, 36 Ala. 197; *May v. Ritchie*, 65 Ala. 602.

<sup>2</sup> *Griswold v. Hicks*, 132 Ill. 494, 24 N. E. Rep. 63. See, also, *Urich's Appeal*, 86 Pa. St. 386, 27 Am. Rep. 707.

<sup>3</sup> *May v. Ritchie*, 65 Ala. 602, per Bricknell, C. J., citing *Dunn v. Davis*, 12 Ala. 135; *Shepherd v. Nabors*, 6 Ala. 631; *Twelves v. Nevill*, 39 Ala. 175; *Robertson v. Johnston*, 36 Ala. 197; *Williams v. McConico*, 36 Ala. 22; *Warn v. Brown*, 102 Pa. St. 347. See, also, *Greer v. Pate*, 85 Ga. 552, 11 S. E. Rep. 869.

division, and when this is made the operation of the deed is exhausted. This is incompatible with an estate tail.<sup>1</sup>

618. In those States where by statute estates tail are declared to be estates in fee simple, there is a disposition to construe the words of limitation as meaning children. Although the language appears to create an estate tail, yet, if any other construction can be adopted without distorting the meaning of the words, the grantor will not be deemed to have intended to create such an estate.<sup>2</sup> Thus a deed to a married woman, "and to the heirs of her body by" her husband named, will be held to create either a joint estate in the mother and her children, or a life estate in the mother with remainder to her children.

A voluntary deed by a husband of substantially all his property to his wife, having children by himself and a former husband, to hold to her "and the heirs of her body by myself as husband," especially excluding rights of inheritance of her heirs by any other person, does not create an estate tail, the children of his body being purchasers. The court say: "The language in the deed, 'heirs of her body by myself as husband,' unrestricted by any other terms of the deed, and in the absence of living children of the wife by the grantor, would create an estate tail special at the common law, upon which our statute would operate. But it being evident that the word 'heirs' is used as the equivalent of 'children,' and there being living children of the grantor by his wife, at the time the deed was executed, the terms employed in the deed and quoted above must be construed, not as words of limitation and inheritance, but as a description of a class of persons to take under the deed as purchasers, and the language is sufficiently definite and certain to be operative for that purpose."<sup>3</sup>

<sup>1</sup> *Herring v. Rogers*, 30 Ga. 615.

<sup>2</sup> *Brann v. Elzey*, 83 Ky. 440; *Tucker v. Tucker*, 78 Ky. 503, where the deed was to a married woman and "the heirs of" her husband; *Fletcher v. Tyler* (Ky.), 17 S. W. Rep. 282, where the word "heirs" was declared to be used in the sense of "children;" *Hodges v. Fleetwood*, 102 N. C. 122, 9 S. E. Rep. 640, where a deed to a married woman for life, "then to descend to her heirs, the children of" her husband, habendum to the "party of the

second part and their heirs," was held to create a life estate only in the woman, with a contingent remainder to the children described.

<sup>3</sup> *Sullivan v. McLaughlin*, 99 Ala. 60, 11 So. Rep. 447, 449, per Thornton, J.; *May v. Ritchie*, 65 Ala. 602; *Slayton v. Blount*, 93 Ala. 575, 9 So. Rep. 241; *Wikle v. McGraw*, 91 Ala. 631, 8 So. Rep. 341; *Robertson v. Johnston*, 36 Ala. 197; *Williams v. McConico*, 36 Ala. 22; *Williams v. Graves*, 17 Ala. 62; *Darden v. Burns*, 6 Ala. 362.

## CHAPTER XXI.

### CONDITIONS PRECEDENT AND SUBSEQUENT.

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#### *I. How defined and created.*

619. Conditions are either precedent or subsequent. A condition in a deed is a qualification of the estate granted. The condition is precedent when it must be performed before the estate can commence, and it is subsequent when it is to be performed after the estate has vested in the grantee. The former fixes the beginning, the latter the ending of the estate.<sup>1</sup> The same technical words of condition are appropriate to create either a condition precedent or a condition subsequent. Whether the condition be one or the other is a question of intention to be gathered from the whole instrument.<sup>2</sup> If the thing required to be done does not necessarily precede the vesting of the estate in the grantee, but may accompany it or follow it, and may as well be done after as before the vesting of the estate; or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, — the condition is subsequent.<sup>3</sup>

<sup>1</sup> California: Civ. Code, §§ 708, 1110. Idaho: R. S. 1887, § 2932. North Dakota and South Dakota: Comp. Laws 1887, §§ 2713, 3429.

<sup>2</sup> Finlay v. King, 3 Pet. 346; Van Horne v. Dorrance, 2 Dall. 304, 317; Jones v. Chesapeake & O. R. Co. 14 W. Va. 514; Rogan v. Walker, 1 Wis. 527; Martin v. Ballou, 13 Barb. 119; Black-

smith v. Fellows, 7 N. Y. 401; Osgood v. Abbott, 58 Me. 73; Brannan v. Mesick, 10 Cal. 95; Mesick v. Sunderland, 6 Cal. 297; Shinn v. Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Chapin v. School Dist. 35 N. H. 445; Raley v. Umatilla Co. 15 Oreg. 172, 13 Pac. Rep. 890.

<sup>3</sup> Finlay v. King, 3 Pet. 346; Parker v. Nichols, 7 Pick. 111; Underhill v. Sara-



Whether a condition is to be construed to be precedent or subsequent is always a question of intent, and it is immaterial where the clause creating the condition is placed in the deed; the question, without regard to locality, always being whether the thing is to happen before or after the estate is to vest.<sup>1</sup> As declared in the Code of Georgia,<sup>2</sup> the law inclines to construe conditions to be subsequent rather than precedent, and to be remediable by damages rather than by forfeiture.

**620. The title under a deed creating a condition subsequent vests in the grantee, and remains in him until it is divested by the entry of the grantor;<sup>3</sup> but in a condition precedent the title does not vest until the act which is made the condition is performed. In the one case the title vests before the condition is performed, and in the other it does not vest at all unless the condition is first performed.<sup>4</sup>**

Where a conveyance is made and accepted upon this express condition, that the grantor reserves the right to live on the land until his death, and provides that his minor children shall be supported out of the proceeds thereof until each shall have received a certain sum, and that the grantee shall pay to each of the minor children a certain sum on certain dates, and that, when the grantee shall have performed the conditions expressed, the legal title to the land shall vest in him absolutely, a condition subsequent is created.<sup>5</sup>

A conveyance of a farm from parents to a daughter, "not to become absolute until the decease" of both grantors, "and then only on this condition," that the grantee "shall deliver to the

*toga & W. R. Co.* 20 Barb. 455, per Allen, J.; *Tallman v. Snow*, 35 Me. 342; *Platt v. Platt*, 42 Conn. 330; *Burnett v. Strong*, 26 Miss. 116; *Bell County v. Alexander*, 22 Tex. 350.

<sup>1</sup> *Earle v. Dawes*, 3 Md. Ch. 230, per Johnson, Ch.; *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636.

<sup>2</sup> Code 1882, § 2295.

<sup>3</sup> *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621; *Shattuck v. Hastings*, 99 Mass. 23; *Gulf, &c. Ry. Co. v. Dunman*, 74 Tex. 265, 11 S. W. Rep. 1094; *Ludlow v. New York, &c. R. Co.* 12 Barb. 440; *Memphis, &c. R. Co. v. Neighbors*, 51 Miss. 412; *Spect v. Gregg*, 51 Cal. 198;

*Front Street, &c. R. Co. v. Butler*, 50 Cal. 574.

<sup>4</sup> *Finlay v. King*, 3 Pet. 346; *Chute v. Washburn*, 44 Minn. 312, 46 N. W. Rep. 555; *Jones v. Chesapeake & O. R. Co.* 14 W. Va. 514.

<sup>5</sup> *Bank v. Stark* (Cal.), 30 Pac. Rep. 531. The court said: "In this reservation we see nothing to indicate that they intended to retain the title in themselves during their lives. On the contrary, it would seem from the language used that they intended to pass the title at once to the grantee, subject to the conditions named." Citing *Hihn v. Peck*, 30 Cal. 280.

grantors or either of them annually, during their or either of their natural lives, one third of the product" of said land, is a conveyance upon a condition subsequent, for the language implies that an estate is to pass by the conveyance; otherwise it seems inconsistent to say that the conveyance shall not become absolute until the condition shall be performed.<sup>1</sup>

621. A grant upon a condition precedent passes the estate only upon the performance of the condition.<sup>2</sup> A condition that the estate shall not vest, until or unless the grantee shall pay a specified sum before a day named, is a condition precedent to the vesting of any estate, and time is an essential part of the contract.<sup>3</sup> A deed recited that the grantor was anxious to secure to the grantee his undivided interest in certain land upon condition that, during the life of the grantor, he was to retain and exercise full and complete control over the property; and in consideration of the premises thus recited, and of natural love and affection, the grantor conveyed the property to the grantee, upon condition, nevertheless, that he, the grantor, died before the grantee, and not otherwise, with habendum to the grantee and his heirs, subject to such condition. The grantor survived the grantee. It was held that this was clearly a condition precedent, and, not being fulfilled, nothing passed by the deed.<sup>4</sup>

Where one conditionally gave a tract of land to his son by an instrument which reserved to the donor not only the rents, issues, and profits of the land while he lived, but which also reserved to him the right to dispose of the land during his lifetime, it was competent for him thereafter to bequeath to another the use of the land, and the rents and profits of the same, for a period of

<sup>1</sup> *Drew v. Baldwin*, 48 Wis. 529, 4 N. W. Rep. 576.

<sup>2</sup> *California*: Civ. Code, § 1436. *Georgia*: Code 1882, § 2295. *North Dakota* and *South Dakota*: Comp. Laws 1887, § 3429. *Oklahoma*: G. S. 1893, ch. 82, § 10. In *Idaho*, however, it is provided that an instrument purporting to be a grant of real property, to take effect upon condition precedent, does not pass the estate upon the performance of the condition. Such instrument is an executory contract for the conveyance of the property. Upon compliance with the condition, the grantee is entitled to a grant or

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conveyance from the grantor or his successors, for the property duly acknowledged for record. R. S. 1887, § 2932. See, also, *Borst v. Simpson*, 90 Ala. 373, 7 So. Rep. 814; *Bennett v. Culver*, 97 N. Y. 250.

<sup>3</sup> *Borst v. Simpson*, 90 Ala. 373, 7 So. Rep. 814. See *Rutland v. Chesson*, 98 Ala. 435, 13 So. Rep. 606; *Tennessee, &c. R. Co. v. East Alabama Ry. Co.* 73 Ala. 426; *Winnepiseogee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. Rep. 171; *Wilson v. Galt*, 18 Ill. 43.

<sup>4</sup> *Earle v. Dawes*, 3 Md. Ch. 230.

time extending two years after his death. The transfer to his son was not to be effective till the donor's death, and not then if he made other disposition of the property during his lifetime.<sup>1</sup>

A condition which prevents the full beneficiary title from vesting in the grantee until its performance does not necessarily render it a condition precedent. Thus a condition that after the grantor's death the grantee shall pay a third person a certain sum of money is construed to be a condition subsequent and not a condition precedent.<sup>2</sup>

**622. A condition precedent must be literally performed ;** and even in equity an estate will not vest where, by reason of a condition precedent unperformed, it will not vest at law.<sup>3</sup>

Where the owner of land which had been used for some years for a cemetery conveyed it to a city for a nominal consideration, provided the city should obtain authority from the legislature and remove the dead within a certain time, and use the land for an ornamental square, or for the erection of public buildings, it was held that the removal of the bodies and the abandonment of the land for cemetery purposes were conditions precedent to the vesting of the title.<sup>4</sup>

Where a day is appointed for the payment of money for a thing to be done, if such day is fixed beyond the time when the act is to be done, the performance of the thing which is the consideration for the payment is a condition precedent to the payment of the money.<sup>5</sup>

Stipulations to do certain things within a given time, in consideration of the payment of money, will not be construed as conditions precedent unless the express language of the condition requires such construction.<sup>6</sup> A condition that, if the purchaser failed to pay for the property in instalments as provided, it should be delivered back and disposed of to pay the price, was held not to be a condition precedent, but that the property passed immediately with a trust in the nature of a vendor's lien for the payment of the price.<sup>7</sup>

<sup>1</sup> *Pennell v. Felch* (Kans.), 39 Pac. Rep. 1023.

<sup>2</sup> *Weinreich v. Weinreich*, 18 Mo. App. 364.

<sup>3</sup> 4 Kent Com. 125; *City Bank v. Smith*, 3 G. & J. 265, 281; *Earle v. Dawes*, 3 Md. Ch. 230, 233.

<sup>4</sup> *Stockton v. Weber*, 98 Cal. 433, 33 Pac. Rep. 332.

<sup>5</sup> *Houston v. Spruance*, 4 Har. (Del.) 117.

<sup>6</sup> *Front Street, &c. R. Co. v. Butler*, 50 Cal. 574; *Tipton v. Feitner*, 20 N. Y. 423, 432.

<sup>7</sup> *Cayton v. Walker*, 10 Cal. 450.

623. "Divers words there be," says Littleton, "which by virtue of themselves make estates upon condition."<sup>1</sup> A condition is created by the use of appropriate words, such as "on condition," "provided," "so as," "so that," "if it happen," or the like, which import, *ex vi termini*, that the vesting or continuance of the estate is to depend upon the observance of the provision named.<sup>2</sup> "To every good condition is required an external form."<sup>3</sup> But apt words, even, do not always create a conditional grant, when the intent of the grantor, as shown by the whole deed, is otherwise.<sup>4</sup> If the intention of the grantor as manifested by the whole deed was merely to create a restriction, effect will be given to the provision in this way, although it be expressed to be upon condition. If, on the other hand, the intention as gathered from the whole instrument was to create a condition, the instrument will be construed as creating a condition, though none of the ordinary words to make a condition are used.<sup>5</sup>

<sup>1</sup> Litt. 328; Co. Litt. 203 a.

<sup>2</sup> Board of Com'rs v. Young, 59 Fed. Rep. 96, 105; Stanley v. Colt, 5 Wall. 119; Hooper v. Cummings, 45 Me. 359; Gray v. Blanchard, 8 Pick. 284; Rawson v. School Dist. 7 Allen, 125, 128, 83 Am. Dec. 670; Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264; Warner v. Bennett, 31 Conn. 468; Gibert v. Peteler, 38 N. Y. 165, 168; Stilwell v. St. Louis & H. Ry. Co. 39 Mo. App. 221; Hoyt v. Kimball, 49 N. H. 322, 326; Chapin v. School Dist. 35 N. H. 445; Raley v. Umatilla Co. 15 Oreg. 172, 13 Pac. Rep. 890; Brown v. Caldwell, 23 W. Va. 187, 48 Am. Rep. 376; Paschall v. Passmore, 15 Pa. St. 295; Karchner v. Hoy, 151 Pa. St. 383, 390, 25 Atl. Rep. 20; Elyton Land Co. v. South & N. Ala. R. Co. 100 Ala. 396, 14 So. Rep. 207. Sheppard, Touchstone, 121, says: "Know therefore that, for the most part, conditions have conditional words for their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of reëntry in the conclusion of the condition, do make the estate conditional, *as, proviso, ita quod, and sub conditione*. . . .

But there are other words, as *si, si contingat*, and the like, that will make an estate conditional also; but then they must have other words joined with them, and added to them in the close of the condition; as that the grantor shall reënter, or that the estate shall be void, or the like." He further says, p. 125: "If the words in the close or conclusion of a condition be thus, That the land shall return to the feoffor, etc., or that he shall take it again, and turn it to his own profit, or that the land shall revert, or that the feoffor shall *recipere* the land, — these are either of them good words in a condition to give a reëntry, as good as the word 'reënter;' and by these words the estate will be made conditional."

<sup>3</sup> Shep. Touch. 126.

<sup>4</sup> Episcopal City Mission v. Appleton, 117 Mass. 326; Sohler v. Trinity Church, 109 Mass. 1; Bray v. Hussey, 83 Me. 329, 22 Atl. Rep. 220; Rawson v. School Dist. 7 Allen, 125, 221, 83 Am. Dec. 670; Stilwell v. St. Louis & H. Ry. Co. 39 Mo. App. 221.

<sup>5</sup> Karchner v. Hoy, 151 Pa. St. 383, 390, 25 Atl. Rep. 20; Elyton Land Co. v. South & N. Ala. R. Co. 100 Ala. 396, 14 So. Rep. 207.

§§ 624, 625.] CONDITIONS PRECEDENT AND SUBSEQUENT.

**624.** It is not, however, necessary to use any of the usual words of condition to create an estate upon condition. If it clearly appears from the terms used that the parties intended to create an estate upon condition, such intention will control.<sup>1</sup> "If, from the nature of the acts to be performed by the grantee and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is upon condition. This is expressly so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee. In such a case a condition subsequent arises by clear implication."<sup>2</sup>

**625.** The condition must appear in the deed of the lands to which the condition is annexed, or in a writing executed by the grantee referring to such deed, or in some way made a part of it.<sup>3</sup> After an absolute deed the grantor cannot by subsequent deed impose conditions, for there is then no estate in the grantor upon which the conditions can take effect.<sup>4</sup>

The condition cannot be established by parol evidence except upon a proper allegation of fraud, accident, or mistake, and upon clear and satisfactory evidence.<sup>5</sup> But the circumstances surround-

<sup>1</sup> *Haggood v. Houghton*, 22 Pick. 480; *Bacon v. Huntington*, 14 Conn. 92; *Sumner v. Darnell*, 128 Ind. 38, 27 N. E. Rep. 162; *Richter v. Richter*, 111 Ind. 456, 12 N. E. Rep. 698; *Wilson v. Wilson*, 86 Ind. 472; *Stilwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240; *Watters v. Bredin*, 70 Pa. St. 235; *Stilwell v. St. Louis & H. Ry. Co.* 39 Mo. App. 221; *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455; *Gibbert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *Hamilton v. Kneeland*, 1 Nev. 40; *Berryman v. Schumacher*, 67 Tex. 312, 3 S. W. Rep. 46; *Jeffery v. Graham*, 61 Tex. 481; *Kilpatrick v. Mayor (Md.)*, 31 Atl. Rep. 805; *Worman v. Teagarden*, 2 Ohio St. 380.

<sup>2</sup> *Richter v. Richter*, 111 Ind. 456, 459, 12 N. E. Rep. 698, per Mitchell, J.

<sup>3</sup> *Schwalbach v. Chicago, M. & St. P. Ry. Co.* 73 Wis. 137, 40 N. W. Rep. 579; *Galveston, &c. R. Co. v. Pfeuffer*, 56 Tex. 66; *Marshall Co. High School v. Iowa Synod*, 28 Iowa, 360; *Thompson v.*

*Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Scantlin v. Garvin*, 46 Ind. 262, 277; *Gadberry v. Sheppard*, 27 Miss. 203; *Moser v. Miller*, 7 Watts, 156. A deed of general warranty in the usual form, conveying lands for the expressed consideration of the sum of one dollar and other good and valuable considerations, and a written contract executed at the same time, by which the grantee, in consideration of the deed, agrees to do certain acts, and provides that, in case of failure to perform such contract, the deed shall become void, and the lands conveyed revert to the grantor, both instruments being acknowledged and recorded at the same time, are to be treated as one, and construed together. *Ritchie v. Kansas, &c. Ry. Co. (Kans.)* 39 Pac. Rep. 718.

<sup>4</sup> *Aleman v. Daly*, 36 Cal. 90.

<sup>5</sup> *Rogers v. Sebastian Co.* 21 Ark. 440; *East Line, &c. R. Co. v. Garrett*, 52 Tex. 133; *Moser v. Miller*, 7 Watts, 156; *Marshall Co. High School v. Iowa Sy-*

ing the parties may be shown, to aid the court in the construction of the condition.<sup>1</sup> As a general rule, a condition cannot be established by implication, as, for instance, by a declaration of the purpose for which the conveyance is made.<sup>2</sup> A condition expressed is presumed to be the only condition,<sup>3</sup> unless its terms fairly imply a further condition.<sup>4</sup>

**626.** A condition may be created by a deed which refers to a condition contained in another paper and is made subject to it. The two instruments are read together, and are of the same effect as if the condition were incorporated in the deed itself.<sup>5</sup> So if, in pursuance of the contract in virtue of which the deed is made, the parties at the time of executing the deed also execute an agreement expressing the condition upon which the property is conveyed, the conveyance is upon the condition so expressed. Thus where, at the time of receiving a deed, the grantee executed an unsealed instrument, declaring that the deed was made on condition that the grantee should support the grantor during his lifetime, the deed and such instrument should be read together in determining the grantee's title under the deed. In such case, when the grantee at the time of receiving the deed executed and delivered the condition, he thereby agreed with the grantor that he accepted the deed upon the condition written, and that the title to the property described in the deed should not become vested in him until he had furnished the support specified in the condition.<sup>6</sup>

But a condition contained in a prior agreement between the parties, in pursuance of which the deed is made, but not expressed or referred to in the deed, does not bind the grantee.<sup>7</sup>

A condition when written upon the back of a deed poll is effectual, for, although the grantee did not sign the condition, by accepting the deed with the condition upon it he accepted it as a deed made upon the condition so declared.<sup>8</sup>

nod, 28 Iowa, 360; *Chapman v. Gordon*, 29 Ga. 250; *Long v. McConnell*, 158 Pa. St. 573, 28 Atl. Rep. 233; *Hammond v. Port Royal, &c. Ry. Co.* 15 S. C. 10.

<sup>1</sup> *Railway Co. v. Beeler*, 90 Tenn. 548, 18 S. W. Rep. 391.

<sup>2</sup> § 640.

<sup>3</sup> *Dunbar v. Stickler*, 45 Iowa, 384; *Jennings v. O'Brien*, 47 Iowa, 392.

<sup>4</sup> *Louisville, &c. R. Co. v. Covington*, 2 Bush, 526.

<sup>5</sup> *Merritt v. Harris*, 102 Mass. 326; *Bear v. Whisler*, 7 Watts, 144.

<sup>6</sup> *Norton v. Perkins* (Vt.), 31 Atl. Rep. 148, per Ross, C. J.

<sup>7</sup> *Moser v. Miller*, 7 Watts, 156.

<sup>8</sup> *Whitney v. French*, 25 Vt. 663; *Graham v. Stevens*, 34 Vt. 166, 80 Am. Dec.

§§ 627, 628.] CONDITIONS PRECEDENT AND SUBSEQUENT.

627. The words of condition should be a part of the habendum, qualifying the grant, controlling but not contradicting the generality of the words in the premises. The words must not only be such as of themselves import a condition, but they must be so connected with the grant in the deed as to qualify or restrain it.<sup>1</sup>

If the words of condition do not introduce a new clause qualifying the grant itself, but are used by way of limitation or qualification of a former clause, they do not import a condition.<sup>2</sup>

It is not absolutely essential that a strict condition should be a part of the habendum; but if it is found in any other part of the deed, as for instance in the premises, or following the covenants, its unusual place in the deed may influence its construction.<sup>3</sup>

II. *Determinable or Qualified Fee.*

628. An estate which is to continue till the happening of a certain event is not upon a condition subsequent, because upon the happening of that event the estate ceases by its own limitation without a reëntury by the grantor. Such an estate is a fee, because it may last forever; it is determinable, because it may end by the happening of the event named. An illustration of a determinable fee is, "as long as the Church of St. Paul shall stand."<sup>4</sup> A grant to a religious society to hold so long as the society shall support certain specified doctrines, the deed reciting that when the land is devoted to other purposes "then the title of said society or its assigns shall forever cease," creates a determinable fee. The grant in such case is not upon a condition

675. And see *Barker v. Cobb*, 36 N. H. 344, where the condition on the back of the deed was signed by the grantee.

<sup>1</sup> *Laberee v. Carleton*, 53 Me. 211, per Danforth, J.; *Packard v. Ames*, 16 Gray, 327, per Bigelow, C. J.; *Methodist Church v. Old Columbia Co.* 103 Pa. St. 608, 614; *Watters v. Bredin*, 70 Pa. St. 235.

<sup>2</sup> *Chapin v. Harris*, 8 Allen, 594, per Gray, J.: "A good illustration of this is thus reported in Leonard: 'A made a lease to B for life, and further grants unto him that it shall be lawful for him to take fuel upon the premises; proviso, that he do not cut any great trees. It was holden by the court that, if the lessee cutteth

any great trees, that he shall be punished in waste; but in such case the lessor shall not reënter, because that proviso is not a condition, but only a declaration and exposition of the extent of the grant of the lessor in that behalf.'" 3 Leon. 16.

<sup>3</sup> *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. Rep. 655, Vann, J., saying: "While this is by no means controlling, it has a significance not to be overlooked, as the instrument was evidently drawn by a skilful conveyancer, who was well acquainted with both the forms and technical terms in common use by experienced draughtsmen of deeds."

<sup>4</sup> 2 Plow. 557.

subsequent, and no reëntry is necessary; but by the terms of the grant the estate is to continue so long as the real estate shall be devoted to the specified uses, and when it shall no longer be so devoted, then the estate will cease and determine by its own limitation.<sup>1</sup>

The proper words for the creation of such an estate are, "until," "during," "so long as," and the like.

**629.** Where an estate is conveyed in fee for a specified purpose and no other, the fee is a base fee, determinable upon the cessation of the use of the property for that purpose. A grant of land adjoining a prison, to be held for the uses and purposes following, that is to say, that it should remain forever unbuilt upon, in order that prisoners might not be able to escape over the wall by means of buildings which might be erected contiguous thereto, creates a qualified fee determinable on the removal of the prison to another site, or the cessation of its necessity by any other means.<sup>2</sup> "It is scarcely needful," say the court, "to add that those decisions which relate to the construction of a deed as conveying an estate on condition subsequent, and deny that effect to a recital that the grant is upon a certain consideration, or to a collateral covenant, are inapplicable. The purpose here is not recited as part of the consideration, nor is its observance collaterally covenanted. Nor is the estate here granted one upon condition. Although there is some confusion in decisions and text-books concerning these two species of estates, there is a radical distinction between a fee determinable by limitation and an estate upon condition subsequent."

**630.** A question or doubt has arisen whether, after all, there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the statute *quia emptores*.<sup>3</sup> "We have considered this question," says Mr.

<sup>1</sup> *First Universalist Society v. Boland*, 155 Mass. 171, 29 N. E. Rep. 524. Allen, J., cites the following authorities as illustrating determinable fees: *Church v. Grant*, 3 Gray, 142, 147; *Ashley v. Warner*, 11 Gray, 43; *Attorney-General v. Manufacturing Co.* 14 Gray, 586, 612; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Fifty Associates v. Howland*, 11 Met. 99, 102; *Owen v. Field*, 102 Mass. 90, 105; *Shep. Touch.* 121, 125.

<sup>2</sup> *Siegel v. Lauer*, 148 Pa. St. 236, 32 Atl. Rep. 996. And see *Kirk v. King*, 3 Pa. St. 436; *Scheetz v. Fitzwater*, 5 Pa. St. 126.

<sup>3</sup> See Gray, *Perp* §§ 31-40, where the question is discussed and authorities are cited. Mr. Challis, in his *Law of Real Property*, 2d ed., Appendix iv. p. 398, in answer to "the learned and ingenious arguments" of Professor Gray against the validity of determinable fees, who de-



Justice Allen of the Supreme Court of Massachusetts,<sup>1</sup> "and, whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, we think the existence of such an estate as a qualified or determinable fee must be recognized in this country, and such is the general consensus of opinion of courts and text-writers."

A conveyance of land to a school district, subject to a covenant that the land should be used for school purposes, and that when such use should cease the property should revert to the grantor, vests in the grantee a qualified fee. Until the happening of such event the grantor is not vested with any title or interest in the land or in the reversion, for the contingency upon which the land is to revert may never happen. He has nothing to convey, and his deed in expectancy of a reverter vests no interest in the grantee, but is wholly without legal force or effect.<sup>2</sup>

631. The right or possibility of reverter after the termination of such an estate is similar to, though not quite identical with, the possibility of reverter which remains in the grantor of land upon a condition subsequent. This right represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or his heirs when the granted estate determines.<sup>3</sup>

declares that Sanders was the first author to distinctly state that the statute put an end to qualified fees, among other things says: "That a cardinal result of the statute *quia emptores* should be left to be discovered by Sanders, in the nineteenth century, seems to me, I confess, what Chillingworth calls 'extremely improbable, and even cousin-german to impossible.' That Lord Coke, Plowden, Croke, Sir Henry Finch, Lord Nottingham, the author of the Touchstone, Sergeant Maynard, Vaughan, Treby, Powell, Lord Hardwicke, Preston, Fearne, Butler, Watkins (to put together at random the names of a few men who have believed with unquestioning faith in the existence of determinable fees since the statute), should have passed their lives in intimate familiarity with the statute without any one of them lighting or stumbling upon what, if it were true, would be a fairly

obvious truth, is not a hypothesis to be accepted, unless no other rational explanation of the language of the statute can be found."

<sup>1</sup> First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. Rep. 524, citing Aqueduct Co. v. Chandler, 9 Allen, 159, 168; Leonard v. Burr, 18 N. Y. 96; Gillespie v. Broas, 23 Barb. 370; State v. Brown, 27 N. J. L. 13; Henderson v. Hunter, 59 Pa. St. 335; Wiggins Ferry Co. v. Ohio & M. R. Co. 94 Ill. 83, 93; 1 Washb. Real Prop. (3d ed.) 76-78; 4 Kent Com. 9, 10, 129. See, also, of English works, in addition to citations above, Shep. Touch. 101; 2 Bl. Com. 109, 154, 155; 1 Cruise Dig. tit. 4, §§ 72-76; 2 Flint Real Prop. 136-138; Prest. Est. 431, 441; Challis, Real Prop. 197-208.

<sup>2</sup> Denver, &c. Ry. Co. v. School Dist. 14 Colo. 327, 23 Pac. Rep. 978; State v. Brown, 27 N. J. L. 13.

<sup>3</sup> First Universalist Society v. Boland,

### III. *Conditions Subsequent not favored in Law.*

**632.** Conditions subsequent are not favored in law. When the terms of the grant will admit of any other interpretation they will not be held to create an estate on condition.<sup>1</sup> If no

155 Mass. 171, 29 N. E. Rep. 524, per Allen, J., citing Challis Real Prop. 31, 63-65, 153, 174, 198, 200, 212; Prest. Est. 431, 471; 2 Plow. 413; Shep. Touch. 120; Smith v. Harrington, 4 Allen, 566, 567; Attorney-General v. Manufacturing Co. 14 Gray, 586, 612; Church v. Grant, 3 Gray, 142, 147-150; Owen v. Field, 102 Mass. 90, 105, 106; Gillespie v. Broas, 23 Barb. 370; Gray Perp. §§ 33, 34, 39, and cases cited.

<sup>1</sup> Stanley v. Colt, 5 Wall. 119. **Alabama:** Elyton Land Co. v. South & N. Ala. R. Co. 100 Ala. 396, 14 So. Rep. 207. **California:** Cullen v. Sprigg, 83 Cal. 56, 23 Pac. Rep. 222. **Connecticut:** Scovill v. McMahon, 62 Conn. 378, 26 Atl. Rep. 479. **Georgia:** Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682. **Illinois:** Boone v. Clark, 129 Ill. 466, 21 N. E. Rep. 850; Noyes v. St. Louis, &c. R. Co. (Ill.) 21 N. E. Rep. 487; Gallaher v. Herbert, 117 Ill. 160, 7 N. E. Rep. 511; Voris v. Renshaw, 49 Ill. 425. **Indiana:** Sumner v. Darrell, 128 Ind. 38, 27 N. E. Rep. 162; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638. **Iowa:** Peden v. Chicago, &c. R. Co. 73 Iowa, 328, 5 Am. St. Rep. 680. **Kansas:** Curtis v. Topeka, 43 Kans. 138, 23 Pac. Rep. 98; Ruggles v. Clare, 45 Kans. 662, 26 Pac. Rep. 25. **Maine:** Bray v. Hussey, 85 Me. 329, 22 Atl. Rep. 220; Laberee v. Carleton, 53 Me. 211; Hooper v. Cummings, 45 Me. 359. **Maryland:** Glenn v. Davis, 35 Md. 208, 6 Am. Rep. 389; Kilpatrick v. Mayor (Md.), 31 Atl. Rep. 805. **Massachusetts:** Ayer v. Emery, 14 Allen, 67; Packard v. Ames, 16 Gray, 327; Merrifield v. Cobleigh, 4 Cush. 178; Hadley v. Hadley Manuf. Co. 4 Gray, 140; Chapin v. Harris, 8 Allen, 594; Sohler v. Trinity Church, 109 Mass. 1; Stone v. Houghton, 139 Mass. 175, 31 N. E. Rep. 719. **Michigan:** Blanchard v.

Detroit, &c. R. Co. 31 Mich. 43, 18 Am. Rep. 142. **Minnesota:** Chute v. Washburn, 44 Minn. 312, 46 N. W. Rep. 555; Farnham v. Thompson, 34 Minn. 330, 57 Am. Rep. 59, 26 N. W. Rep. 9. **Mississippi:** Gadberry v. Sheppard, 27 Miss. 203. **Missouri:** Suiwell v. St. Louis & H. Ry. Co. 39 Mo. App. 221; Weinreich v. Weinreich, 18 Mo. App. 364; Morrill v. Wabash Ry. Co. 96 Mo. 174, 9 S. W. Rep. 657; Studdard v. Wells, 120 Mo. 25, 25 S. W. Rep. 201, per Black, C. J.; Roanoke Ins. Co. v. Kansas City & S. R. Co. 108 Mo. 50, 17 S. W. Rep. 1000. **New Hampshire:** Page v. Palmer, 48 N. H. 385; Emerson v. Simpson, 43 N. H. 475, 82 Am. Dec. 168; Hoyt v. Kimball, 49 N. H. 322; Chapin v. School Dist. 35 N. H. 445. **New Jersey:** Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. Rep. 4; Woodruff v. Water Power Co. 10 N. J. Eq. 489; Southard v. Cent. R. Co. 26 N. J. L. 13. **New York:** Post v. Weil, 115 N. Y. 361, 22 N. E. Rep. 145, 12 Am. St. Rep. 809; Lyon v. Hersey, 103 N. Y. 264, 8 N. E. Rep. 518; Craig v. Wells, 11 N. Y. 315; Duryee v. New York, 96 N. Y. 477; Woodworth v. Payne, 74 N. Y. 196, 30 Am. Rep. 298; Jackson v. Silvernail, 15 Johns. 278; Graves v. Deterfing, 120 N. Y. 447; Baker v. Mott, 78 Hun, 141, 28 N. Y. Supp. 968. **Ohio:** Watterson v. Ury, 5 Ohio C. C. 347. **Oregon:** Raley v. Umatilla Co. 15 Oreg. 172, 13 Pac. Rep. 890; Coffin v. Portland, 16 Oreg. 77, 17 Pac. Rep. 580; Portland v. Terwilliger, 16 Oreg. 465, 19 Pac. Rep. 90. **Rhode Island:** Greene v. O'Connor (R. I.), 25 Atl. Rep. 692. **South Carolina:** Hammond v. Port Royal, &c. Ry. Co. 15 S. C. 10, 32. **Texas:** Jeffery v. Graham, 61 Tex. 481. **Vermont:** Waterman v. Clark, 58 Vt. 601, 2 Atl. Rep. 578; Palmer v. Ryan, 63 Vt. 227, 22 Atl. Rep. 574. **Wis-**

words of condition are used, and no words indicating an intention that under any circumstances the estate may be forfeited, or may revert to the grantor or his heirs, or that he or they may reënter and hold the land, and there is nothing in the nature of the acts to be done by the grantee indicating that the estate is to be held upon condition, the deed will be held to convey an estate to the grantee and his heirs forever. The deed will not be held to create an estate upon condition, unless the language to that effect is so clear as to leave no room for any other construction.<sup>1</sup> Thus, where parents conveyed land to their son, reserving to themselves a life estate, and stating in the deed that such son "is to pay the taxes on said land, and has to support the grantors during their natural lifetime, and at their death the son shall have possession," the land was not conveyed upon a condition subsequent, because no words of condition were used, and there was no clause of reverter or reëntry, and no intention to create a strict condition can be gathered from the whole instrument. "To say the stipulation in the deed to pay the taxes and support the grantors is a condition subsequent, the non-performance of which will defeat the estate granted, is to make a stipulation for the parties which they did not see fit to make for themselves."<sup>2</sup>

633. Whether the language used constitutes a condition is a question of law for the court, with which the jury have nothing to do.<sup>3</sup> "The character of the fee conveyed must be ascertained by a construction of the words of that deed. If the conveyance is less than an absolute fee simple, it must be because the deed has so limited and qualified the fee conveyed as to make it dependent upon conditions either precedent or subsequent. To determine this, we may look to the whole deed, and

consin: *Wier v. Simmons*, 55 Wis. 637, 13 N. W. Rep. 873; *Mills v. Evansville Seminary*, 58 Wis. 135, 15 N. W. Rep. 133; *Lowe v. Hyde*, 39 Wis. 345.

<sup>1</sup> *Ayer v. Emery*, 14 Allen, 67; *Young v. Clement*, 81 Me. 512, 17 Atl. Rep. 707; *Glenn v. Davis*, 35 Md. 208, 6 Am. Rep. 389; *Curtis v. Board of Education*, 43 Kans. 138, 23 Pac. Rep. 98; *Ruggles v. Clare*, 45 Kans. 662, 26 Pac. Rep. 25; *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. Rep. 222; *Boone v. Clark*, 129 Ill. 466, 21 N. E. Rep. 850; *Studdard v. Wells*, 120 Mo.

25, 25 S. W. Rep. 201; *Baker v. Mott*, 78 Hun, 141, 28 N. Y. Supp. 968; *Lyon v. Hersey*, 103 N. Y. 264, 8 N. E. Rep. 518; *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363; *Blanchard v. Morey*, 56 Vt. 170.

<sup>2</sup> *Studdard v. Wells*, 120 Mo. 25, 25 S. W. Rep. 201.

<sup>3</sup> *Laberee v. Carleton*, 53 Me. 211; *Hammond v. Port Royal Ry. Co.* 15 S. C. 10; *Cox v. Freedley*, 33 Pa. St. 124, 130, 75 Am. Dec. 584.

search its four corners, to ascertain the intent of the grantor.”<sup>1</sup> The intent is to be gathered from the whole instrument by following out the object and spirit of the deed or contract.<sup>2</sup>

**634. A purchaser by a deed which imposes a duty upon him by condition assumes the performance of it by his acceptance of the deed.** Thus, where a lot of land is sold subject to the condition that the grantee shall permit the proprietor of each adjoining lot who may build to erect one half of the thickness of the division wall on such lot, and that the grantor, his heirs or assigns, shall pay to the said proprietor so erecting such wall a proportionate part of the cost thereof for such part of the wall as the grantee, his heirs or assigns, may use or occupy, the grantee having the same right to place half the thickness of his wall on each adjoining lot, the grantee or any subsequent purchaser from him becomes bound by the acceptance of his deed to pay for such part of a division wall so built as he may use to the owner of the adjoining lot. Such purchaser is not liable as for a breach of covenant, because he did not sign and seal the deed; but the law implies a promise to perform the condition or stipulation from his acceptance of the deed, on which an action may be maintained.<sup>3</sup>

**635. When it is doubtful whether a provision in a deed should be construed to be a covenant or a condition, the words used not being in form either the one or the other, the courts will construe it to be a covenant, so as to avoid a forfeiture.**<sup>4</sup>

<sup>1</sup> Board of Com'rs v. Young, 59 Fed. Rep. 96, 102, per Lurton, J.

<sup>2</sup> St. Louis v. Wiggins Ferry Co. 88 Mo. 618; Studdard v. Wells, 120 Mo. 25, 25 S. W. Rep. 201.

<sup>3</sup> Maine v. Cumston, 98 Mass. 317. See, also, Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399.

<sup>4</sup> Hoyt v. Kimball, 49 N. H. 322; Chapin v. School District, 35 N. H. 445, 451; Gal-  
laher v. Herbert, 117 Ill. 160, 7 N. E. Rep.  
511; Board of Education v. Trustees, 63  
Ill. 204; Studdard v. Wells, 120 Mo. 25,  
25 S. W. Rep. 201; St. Louis v. Wiggins  
Ferry Co. 88 Mo. 618; Wheeler v. Das-  
comb, 3 Cush. 285; Graves v. Deterling,  
120 N. Y. 447, 24 N. E. Rep. 655; Craig

v. Wells, 11 N. Y. 315; Parmelee v. Rail-  
road Co. 6 N. Y. 74, 79; McKnight v.  
Kreutz, 51 Pa. St. 232; Paschall v. Pass-  
more, 15 Pa. St. 295; Thornton v. Tram-  
mell, 39 Ga. 202; Kilpatrick v. Mayor  
(Md.), 31 Atl. Rep. 805; Earle v. Dawes,  
3 Md. Ch. 230; Scoville v. McMahon,  
62 Conn. 378, 26 Atl. Rep. 479, 481;  
Peden v. Chicago, &c. R. Co. 73 Iowa, 328,  
35 N. W. Rep. 424, 5 Am. St. Rep. 680;  
Greene v. O'Connor (R. I.), 25 Atl. Rep.  
692; Merrifield v. Cobleigh, 4 Cush. 178,  
184; Rawson v. School District, 7 Allen,  
125. In the elaborate and able opinion  
delivered in the last-cited case by Bigelow,  
C. J., the court said: "If it be doubtful  
whether a clause in a deed be a covenant

The construction must not, however, be a strained or unreasonable one, or one that was plainly not contemplated by the parties.<sup>1</sup>

Where a deed in fee contained these words, "It being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square," it was held that these were words of covenant, and not words of condition, and that the remedy for a breach was an action for damages, and not a forfeiture of the estate for condition broken.<sup>2</sup>

Where a right of way was conveyed to a railroad company, "provided, however, that any other railroad running into or through the city shall have the right to run a parallel track along upon the same right of way," this provision was construed to be a covenant or limitation, rather than a condition subsequent, no right of entry being reserved for a breach of it. The court regarded it as more consonant with equity and the general spirit and purpose of the conveyance to construe the proviso as a covenant or limitation upon the use of the way granted than as a strict condition.<sup>3</sup>

A proviso in a deed that the grantee shall erect and maintain at his own expense all division fences is not a condition subsequent, but an implied covenant. The proviso does not suggest that the parties intended or understood that a failure to comply with it should work a forfeiture of the land.<sup>4</sup> In a deed of a right of way to a railroad company, a condition that it will build, immediately after the road is finished, two bridges across a cut in the grantor's land, is not a condition which will authorize a forfeiture of the grant upon a failure to perform it.<sup>5</sup>

or condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument." In *Scoville v. McMahon*, 62 Conn. 378, 26 Atl. Rep. 479, 481, Hall, J., said: "Courts will always construe clauses in deeds as covenants, rather than conditions, if they can reasonably do so." See, also, as illustrating the subject, *Clark v. Martin*, 49 Pa. St. 289, 297; *Stanley v. Colt*, 5 Wall. 119; *Countryman v. Deck*, 13 Abb. N. C. 110; *Ayling v. Kramer*, 133 Mass. 12; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168; *Stoddard v. Wells*, 120 Mo. 25, 25 S. W. Rep.

201; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. Rep. 479; *Young v. Clement*, 81 Me. 512, 17 Atl. Rep. 707.

<sup>1</sup> *Smith v. Barrie*, 56 Mich. 314, 22 N. W. Rep. 816, 56 Am. Rep. 391; *Guild v. Richards*, 16 Gray, 309; *Wilson v. Wilson*, 86 Ind. 472; *Taylor v. Cedar Rapids & St. P. R. Co.* 25 Iowa, 371.

<sup>2</sup> *Thornton v. Trammell*, 39 Ga. 202.

<sup>3</sup> *Elyton Land Co. v. South & N. Ala. R. Co.* 100 Ala. 396, 14 So. Rep. 207.

<sup>4</sup> *Palmer v. Ryan*, 63 Vt. 227, 22 Atl. Rep. 574.

<sup>5</sup> *Roanoke Inv. Co. v. Kansas City & S. R. Co.* 108 Mo. 50, 17 S. W. Rep. 1000.

**636.** If the parties themselves expressly call the provision a covenant instead of a condition, their language is significant of their intention. "This alone, however, would not make it a covenant, as that which is termed a 'covenant' may be a condition, and that which is termed a 'condition' may be a covenant. But it has an important bearing upon the intention of the parties, because technical terms in a conveyance are presumed to have been used with their accustomed meaning, unless the circumstances and context indicate a different intent."<sup>1</sup>

The same provision cannot be both a condition and a covenant. The grantor cannot claim a forfeiture and also damages for a breach of a covenant.<sup>2</sup>

**637.** If the technical words of condition are not used, and there is no clause providing that the grantor may reënter, the deed will generally be construed as creating a covenant rather than a condition.<sup>3</sup>

Other words used in connection with technical words of condition may serve to show that no forfeiture for a breach of the provision

<sup>1</sup> *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. Rep. 655, per Vann, J.

<sup>2</sup> *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455.

<sup>3</sup> *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. Rep. 479; *Packard v. Ames*, 16 Gray, 327; *Chapin v. School District*, 35 N. H. 445; *Hoyt v. Kimball*, 49 N. H. 322; *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. Rep. 511; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. Rep. 655; *Lyon v. Hersey*, 103 N. Y. 264, 270, 8 N. E. Rep. 518; *Craig v. Wells*, 11 N. Y. 315, 320; *Strong v. Doty*, 32 Wis. 381; *Studdard v. Wells*, 120 Mo. 25, 25 S. W. Rep. 201; *Risley v. McNiece*, 71 Ind. 434; *Ruggles v. Clare*, 45 Kans. 662, 26 Pac. Rep. 25; *Curtis v. Board of Education*, 43 Kans. 138, 23 Pac. Rep. 98.

In the latter case the court say, referring to the deed in that case: "There are no words in the deed stating that the estate was or should be conveyed upon condition, or that it might be forfeited under any circumstances whatever, or that the estate might under any circumstances

revert to the grantors or their heirs, or that they might under any circumstances ever have the right to reënter the premises. Nor was the estate conveyed or to be continued in existence upon any such terms as 'provided' or 'if' something in the future should be done or not done, or happen or not happen. Indeed, there is nothing sufficiently strong in any part of the deed, or in the whole deed, to indicate that the estate was conveyed, or intended to be conveyed, upon any condition, either precedent or subsequent; but, taking the whole deed together, it shows that an absolute estate in fee simple was intended to be conveyed, and was conveyed, and was to continue in the grantees forever. The authorities are uniform that estates upon condition subsequent, which after having been fully vested may be defeated by a breach of the condition, are never favored in law, and that no deed will be construed to create an estate upon condition unless the language to that effect is so clear that no room is left for any other construction."

was intended; as, for instance, in case some other remedy than a forfeiture is provided. Thus, where it was provided that in case of a breach of the condition the grantors, "by their agent, servant, or assigns, may enter *and abate the same* without being liable to any action of trespass therefor," it was considered that this stipulation, which would be unnecessary if it were intended that there should be a forfeiture by operation of law, and which is also inconsistent with the idea of forfeiture, excluded the remedy by forfeiture.<sup>1</sup>

638. But if the language used imports a condition only, and it is moreover clear that the parties intended that the legal consequences of a breach of a condition should follow a violation of the terms of the provision, this cannot be treated as a covenant, but must be treated as a condition.<sup>2</sup> A condition is not a covenant. The courts cannot disregard the distinction between them. "Upon covenants, the legal responsibility of their non-fulfilment is, that the party violating them must respond in damages. The consequence of the non-fulfilment of a condition is a forfeiture of the estate. The grantor may reënter at his will and possess himself of his former estate."<sup>3</sup>

A clause in a conveyance that it is made "upon the express stipulation that a dwelling-house should be moved or erected on the ground within three years," at a cost not less than a certain sum, does not constitute a condition.<sup>4</sup> If, however, such a clause is inserted in the form of an express condition, or it is declared that a breach of the stipulation shall work a forfeiture, the conveyance will be construed as creating a condition subsequent.<sup>5</sup> A condition that the grantee shall erect upon the land conveyed a cotton

<sup>1</sup> Hoyt v. Kimball, 49 N. H. 322.

<sup>2</sup> Studdard v. Wells, 120 Mo. 25, 25 S. W. Rep. 201; Cornelius v. Ivins, 26 N. J. L. 376; Sharon Iron Co. v. Erie, 41 Pa. St. 341; Palairot v. Snyder, 106 Pa. St. 227; Woodruff v. Water Power Co. 10 N. J. Eq. 489; Langley v. Chapin, 134 Mass. 82; Gray v. Blanchard, 8 Pick. 284; Hammond v. Port Royal, &c. Ry. Co. 15 S. C. 10, 33; Jeffery v. Graham, 61 Tex. 481.

<sup>3</sup> Woodruff v. Water Power Co. 10 N. J. Eq. 489; Warner v. Bennett, 31 Conn. 468; Hoyt v. Ketcham, 54 Conn. 60, 5

Atl. Rep. 606; Underhill v. Saratoga & W. R. Co. 20 Barb. 455; Carpenter v. Graber, 66 Tex. 465, 1 S. W. Rep. 178; Odell v. Cannon, 79 Ga. 515, 4 S. E. Rep. 558; Blanchard v. Detroit, &c. R. Co. 31 Mich. 43, 18 Am. Rep. 142; Hammond v. Port Royal, &c. Ry. Co. 15 S. C. 10; Pepin Co. v. Prindle, 61 Wis. 301, 21 N. W. Rep. 254.

<sup>4</sup> Stone v. Houghton, 139 Mass. 175, 31 N. E. Rep. 719.

<sup>5</sup> O'Brien v. Wagner, 94 Mo. 93, 7 S. W. Rep. 19; Clarke v. Brookfield, 81 Mo. 503, 51 Am. Rep. 243.

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factory, within two years from the date of the conveyance, is a condition and not a covenant.<sup>1</sup>

639. A condition cannot be enforced as an agreement where the language used imports a condition only, and there are no words importing an agreement, but the only remedy is through a forfeiture.<sup>2</sup> If there are no promissory words, or words which can be construed as such, the condition does not create a personal liability.<sup>3</sup> But the deed may contain a condition upon breach of which the grantor might enforce a forfeiture, and also a covenant on the part of the grantee upon a breach of which the grantor may in equity compel a specific performance or maintain an action for damages, and in such case the grantor has his election of remedies.<sup>4</sup>

If the language and intent of the deed clearly fix the legal import of the instrument as creating a condition, it is of no consequence that the provision is elsewhere in the deed referred to as being a covenant.<sup>5</sup>

640. The nature and purpose of the deed and the circumstances of the transaction may control the use and meaning of words of condition so that they will not have the effect of limiting the estate conveyed. Thus, in the language of the Supreme Court of the United States, "the word 'proviso' is an appropriate one to constitute a common-law condition in a deed

<sup>1</sup> Langley v. Chapin, 134 Mass. 82.

<sup>2</sup> Woodruff v. Trenton Water Power Co. 10 N. J. Eq. 489; Parsons v. Miller, 15 Wend. 561, 564; Jackson v. Florence, 16 Johns. 47; Palmer v. Plank Road Co. 11 N. Y. 376, 389, where the court say: "It by no means follows, because a grantee consents to take an estate subject to a condition, that he also consents to obligate himself personally for the performance of the condition. Many cases might be imagined in which one would be willing to risk the forfeiture of the estate, while he would be altogether unwilling to incur the hazard of a personal responsibility in addition."

<sup>3</sup> Blanchard v. Detroit, &c. R. Co. 31 Mich. 43, 18 Am. Rep. 142; Parsons v. Miller, 15 Wend. 561, 564.

<sup>4</sup> Stuyvesant v. New York, 11 Paige, 414.

<sup>5</sup> Blanchard v. Detroit, &c. R. Co. 31 Mich. 43, 18 Am. Rep. 142, Graves, C. J., saying: "When an instrument or provision is clearly and distinctly so drawn and consummated that the law at once attaches, and determines that it possesses a specific legal nature, and exclusively belongs to a given class of transactions, the parties cannot, by arbitrarily assigning a name to it wholly foreign to its true character, succeed in transforming it, and so cause it to stand and operate in a manner wholly alien to it. . . . In such a case the law attaches to the act, and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant."



or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust."<sup>1</sup> In a case before the House of Lords Lord Chelmsford said: "Very little if any stress can properly be laid upon the words 'intent and purpose' and 'upon condition' in the will as proof of the testator's intention to create either a trust or a condition. Cases are to be found in which, in gifts of this sort, a condition has been held to be created by the word 'intent,' and it was not unusual formerly in charitable dispositions to impose trusts in the form of conditions."<sup>2</sup>

In a deed to a railroad company, a condition that the company should erect a private crossing under the railroad track may properly be construed as a reservation of a mere easement to the grantor, if there is nothing further in the deed which indicates an intention to make the compliance with such provision a condition subsequent. The provision for the right of way was treated as part of the consideration for the conveyance. It was accordingly held that the grantor could maintain an action for damages against the railroad for closing the crossing.<sup>3</sup>

A deed "upon this further condition," that the grantee should permit the grantor to have access through the land to the waters

<sup>1</sup> *Stanley v. Colt*, 5 Wall. 119, 166, per Nelson, J. In this case the testator devised land to a religious society for its use or benefit, "Provided that said real estate be not hereafter sold or disposed of," and in connection and continuation added numerous minute directions in the nature of regulations for the guidance of trustees whom he appointed to manage it, and with a view to the greatest advantage of the society. It was held that these provisions constituted a limitation in trust, and not a common-law condition.

<sup>2</sup> *Attorney-General v. Wax Chandlers' Co.* 6 L. R. H. L. 1.

<sup>3</sup> *Stilwell v. St. Louis & H. Ry. Co.* 39 Mo. App. 221. The court by Biggs, J., say: "It is quite evident that neither party intended or expected to make the

title to the easement granted depend upon the maintenance of the private road. Such a contract would have been against the interests of the company; and its enforcement, in case of violation, would by no means have restored to Ford his property in its original condition. The construction contended for by the defendant is unreasonable and clearly against the evident intention of both parties, and as the deed by its terms does not necessarily create a conditional estate, and as it does not so appear by clear implication, we are of the opinion that no such estate was created." *Rombauer, P. J.*, dissented on the ground that the deed in express terms created a condition, and the court could not say there was no condition. He cited *Hubbard v. Kansas City, &c. R. R. Co.* 63 Mo. 68, which is in direct conflict.

of a harbor by a road heretofore used, was held not to constitute a condition subsequent. There was in the deed no clearly expressed intention importing that the estate was to depend upon a contingency provided for. The legal effect of the condition was to annex a right of way to the land conveyed. It was a reservation in favor of the grantee.<sup>1</sup>

Where a devise was made "upon the express condition" that the devisee should pay all legacies within twelve months, but added, "and I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid, and I do hereby charge and make chargeable all my said real and personal estate with the payment of the aforesaid legacies," it was held that there was no condition for which an entry could be made, but only a trust.<sup>2</sup>

641. Even the words "upon condition" do not of necessity create an estate upon condition.<sup>3</sup> Thus, in a deed of land to a religious society to use for purposes of public worship, the words "in trust nevertheless and upon condition always" were held not to create an estate on condition, but merely a trust. Taking into consideration the circumstances of the case, the words "upon

<sup>1</sup> *Baker v. Mott*, 78 Hun, 141, 28 N. Y. Supp. 968; *Lyon v. Hersey*, 103 N. Y. 264, 8 N. E. Rep. 518.

<sup>2</sup> *Wright v. Wilkin*, 2 Best & S. 232. *Crompton, J.*, said: "I think that the rule is well laid down by Lord St. Leonards with regard to estates upon condition, 'that what by the old law was deemed a devise upon condition would now, perhaps, in almost every case, be construed a devise in fee upon trust.'" See *Attorney-General v. Southmolton*, 14 Beav. 357; *Merchant Tailors' Co. v. Attorney-General*, L. R. 11 Eq. 35.

<sup>3</sup> *Stanley v. Colt*, 5 Wall. 119; *Avery v. New York Cent. & H. R. R. Co.* 106 N. Y. 142, 12 N. E. Rep. 619, 24 N. E. Rep. 20; *Post v. Weil*, 115 N. Y. 361, 22 N. E. Rep. 145; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. Rep. 655; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Sohier v. Trinity Church*, 109 Mass. 1; *Paschall v. Passmore*, 15 Pa. St. 295; *Bacon v. Huntington*, 14 Conn. 92; *Worman v. Teagarden*, 2 Ohio St. 380; *Watters v.*

*Bredin*, 70 Pa. St. 235; *Hoyt v. Kimball*, 49 N. H. 322; *Hunt v. Wright*, 47 N. H. 401; *Dunlap v. Mobley*, 71 Ala. 102; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. Rep. 9, 57 Am. Rep. 59; *Stilwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240; *Wilson v. Wilson*, 86 Ind. 472; *Laberee v. Carleton*, 53 Me. 211; *Neely v. Hoskins*, 84 Me. 386, 24 Atl. Rep. 882. Per *Peters, C. J.*: "The term 'condition' does not necessarily import it. 'Condition' may mean 'trust,' and 'trust' mean 'condition,' oftentimes. The construction must depend upon the context and any admissible evidence outside of the deed." In *Kilpatrick v. Mayor (Md.)*, 31 Atl. Rep. 805, *Page, J.*, said: "Technical words are not absolutely essential to create a condition, nor, on the other hand, does their use necessarily raise one. Such words may be controlled by the context of the instrument in which they are used, so that sometimes they work a limitation and condition, and sometimes a covenant or a trust only."

condition " were regarded as not having been used in their technical sense. The grantors who used these words were merely a committee who had taken the title in trust for the society ; and if the title were to come back to them or their heirs by forfeiture, it must be held by them in trust for the society, and would thus be turned into a trust estate.<sup>1</sup>

Apt words of condition will not create an estate upon condition if the intention of the grantor, as manifested by the whole deed, is otherwise. Thus, where land was conveyed to a religious society, its successors and assigns, "upon and subject to the condition" that the society should continue to hold and occupy and improve the land and chapel standing thereon, for the support of religious worship, "and also upon the further condition" that no building should be erected upon a certain portion of the land conveyed until certain events should occur, it was held, upon a petition in equity brought by the society after the locality had become unfit for the purposes for which the land was conveyed, that the deed did not create a condition, and that a sale should be decreed.<sup>2</sup> The purpose of the conditional paragraph was declared to be to define and regulate the use of the estate by the grantee, not by the grantor or his heirs.

642. Mere words, though they be the strongest words of condition, will not entail a forfeiture of the estate, unless it appears that this was the distinct intention of the grantor, and a necessary understanding of the parties to the instrument. The intention of the parties as gathered from the whole deed and from the surrounding circumstances, rather than technical words of condition, controls the interpretation of the deed. This rule is strongly declared by the New York Court of Appeals in a recent decision, in which Mr. Justice Gray says: "If the only reason for construing a clause is in the technical words which have been used, the court may disregard them in performing the office of interpretation. If we can construe this clause as an obligation to abstain from doing the thing described, which, by acceptance of the deed, became binding upon the grantee as an agreement, enforceable in behalf of any interest entitled to invoke its protec-

<sup>1</sup> *Sohier v. Trinity Church*, 109 Mass. 117 Mass. 326. Gray, C. J., cited *Sohier* 1, 19. For a similar case, see *Neely v. Trinity Church*, 109 Mass. 1, 19; *Attorney-General v. Wax Chandlers' Co. L.*

<sup>2</sup> *Episcopal City Mission v. Appleton*, R. 6 H. L. 1.

tion, I think we are in conscience bound to give that construction, and thereby place ourselves in accord with that inclination of the law which regards with disfavor conditions involving forfeiture of estates. In this connection it may be noted that there is no clause in the deed giving the right to reënter for conditions broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor or his heirs to reënter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a reëntry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance in connection with the circumstances of the case and the intent to be fairly presumed therefrom.”<sup>1</sup>

In this case the owner of two adjoining estates, occupied by him as farms, contracted to sell one of them “upon special condition that no part of the land or buildings thereon should be used or occupied as a tavern.” Some years afterwards the owner, being financially embarrassed, conveyed both estates to trustees subject to this agreement, and the trustees shortly afterwards made a deed in fulfilment of this agreement, with the “express condition that the aforesaid premises shall not, nor shall any part thereof, be at any time hereafter used or occupied as a tavern, or public house of any kind.” Subsequently the trustees sold the remaining estate without inserting any such condition. The former owner then had no interest in either estate other than obtaining from them all that they would bring, and the trustees had no other interest. Neither the owner nor the trustees had any interest that the restrictive clause should operate as a condition subsequent. “There was no interest,” say the court, “which was not adequately met by the creation of a covenant or limitation in trust that the property should not be used for the one certain purpose mentioned.” The two estates were subsequently united in one owner, and when, upon a sale of a portion of the estate which was affected by the provision under consideration, the purchaser objected that it was subject to a common-law forfeiture and declined to complete his purchase, it was held that his objection was untenable; that the provision was simply a covenant

<sup>1</sup> *Post v. Weil*, 115 N. Y. 361, 371, 22 N. E. Rep. 145.

running with the land for the benefit of the adjoining estate; and that it was extinguished by the union of both estates in the same owner.<sup>1</sup>

643. The consideration named for a grant does not ordinarily imply a condition, so that upon a failure of the consideration a forfeiture may be declared.<sup>2</sup> Any exception there may be to this rule "is confined to cases where the subject-matter of the grant is in its nature executory, as of an annuity to be paid for services to be rendered or a privilege to be enjoyed."<sup>3</sup> A grant "made upon the consideration that" the grantee, his heirs, executors, and administrators, should fulfil certain agreements for the support of the grantor and his wife, was held not to be a

<sup>1</sup> *Post v. Weil*, 115 N. Y. 361, 22 N. E. Rep. 145. The court cite and rely upon *Avery v. N. Y. Cent. & C. R. R. Co.* 106 N. Y. 142, where the railroad company held lands under a deed containing an "express condition" that the company should at all times maintain an opening to a hotel adjacent to the premises. A lessee of the hotel sought to enjoin the company from maintaining a fence upon the land, which blocked up a passageway between the railroad property and the hotel. The company contended that the provision created a condition subsequent, which could only be taken advantage of by the grantors and their heirs. The court, however, decided against the contention of the railroad company, saying: "The fact that the deed uses the language 'upon condition,' when referring to the conveyance by the grantors, is not conclusive that the intention was to create an estate strictly upon condition. . . . Construction may frequently be aided by reference to all the circumstances surrounding the parties at the time of the execution of the deeds, because the court is thus enabled to be placed exactly in their situation, and to view the case in the light of such surroundings." After referring to the facts, he writes: "All these facts would lead one to the unhesitating conclusion that the language used in those deeds in 1857 was for the benefit of the

hotel property, and was not meant to create a condition subsequent."

In confirmation of the views given in the above decisions, see *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. Rep. 1013, affirming 10 N. Y. Supp. 364, where a clause in a deed of land, reciting that the grant is on the "express condition" that the grantee, his heirs or assigns, shall not thereafter maintain a nuisance on the premises, does not create a condition subsequent, but is a covenant running with the land; and a purchaser at a foreclosure sale of the granted premises cannot refuse to complete his purchase on the ground of a defect in the title, as the covenant does not bind him any further than he would be bound by law in the absence of any covenant. Also, *Countryman v. Deck*, 13 Abb. N. C. 110; *Hoyt v. Kimball*, 49 N. H. 322; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Stanley v. Colt*, 5 Wall. 119.

<sup>2</sup> *Berkley v. Union Pac. Ry. Co.* 33 Fed. Rep. 794; *Laberee v. Carleton*, 53 Me. 211; *Ayer v. Emery*, 14 Allen, 67; *Martin v. Martin*, 131 Mass. 547; *Morrill v. Wabash, & C. Ry. Co.* 96 Mo. 174, 9 S. W. Rep. 657; *Rainey v. Chambers*, 56 Tex. 17; *Risley v. McNiece*, 71 Ind. 434; *Portland v. Terwilliger*, 16 Oreg. 465, 19 Pac. Rep. 90.

<sup>3</sup> *Rawson v. School Dist.* 7 Allen, 125, 83 Am. Dec. 670, per Bigelow, C. J. See, also, *Wilson v. Wilson*, 86 Ind. 472.

grant upon a condition subsequent. "There are no apt words in the deed," say the court, "to create a condition; there is no clause of reëntury or forfeiture; it is not provided that the deed shall be void in a certain contingency; nor was the conveyance made solely in consideration of certain acts to be done, or for the accomplishment of a specific purpose, on the fulfilment of which the estate granted is made to depend. The grantor has not only omitted to use any words which can be properly held to create an estate on condition according to the technical rules of law, but he has also failed to indicate any clear intent to cause the estate to be defeated by reason of any act or omission of the grantee."<sup>1</sup>

A warranty deed of an undivided half of a tract of land "in consideration of clearing the whole of all taxes now due, and tax claims of all kinds for which the land has been sold, or is now subject to sale," is an absolute conveyance, and on its delivery vests title in the grantee, and is not a deed upon condition precedent or subsequent.<sup>2</sup> And so a recital in a deed by a father to his son that the son had promised to remain with the grantor, and after the grantor's death to support his widow, does not constitute a condition.<sup>3</sup>

Even where a grantee holding an estate upon condition transferred it to another, in consideration that the latter should perform the condition, the second grantee does not hold the estate upon condition, but is merely under a personal obligation to perform the condition.<sup>4</sup>

Where land was conveyed upon consideration that a railroad company is to "locate, erect, and maintain" upon the land its depot, and in pursuance of the conveyance the depot was erected and maintained for eleven years and then was removed, the land did not revert. "The erection and maintenance of the depot is stated to be a consideration, a consideration perhaps in the nature of a condition subsequent; but the conveyance does not purport to be one upon condition that the grantee will perform, but it is a conveyance in consideration of its promise to erect and maintain. That consideration it has partially performed. . . . Under those circumstances, where there is a part performance, — a part

<sup>1</sup> *Ayer v. Emery*, 14 Allen, 67.

<sup>3</sup> *Perry v. Scott*, 51 Pa. St. 119. See,

<sup>2</sup> *Ruggles v. Clare*, 45 Kans. 662, 26 Pac. Rep. 25.

also, *Harris v. Shaw*, 13 Ill. 456.

<sup>4</sup> *Norris v. Laberee*, 58 Me. 260.

payment,—the title does not revert. There may be a cause of action for damages, but the title does not revert upon a mere partial failure of the consideration.”<sup>1</sup>

**644.** A condition for the payment of money to third persons by the grantee within a fixed time will be construed to be merely a charge upon the land, unless a different intent is apparent, or the language of the condition is so clear as to leave no room for construction or doubt.<sup>2</sup> A conveyance “subject to the purchase-money,” and to an agreement concerning the same, creates an equitable lien upon the land conveyed.<sup>3</sup>

**645.** A provision in a deed that the grantee shall assume and pay a mortgage upon the land conveyed does not constitute a condition upon the breach of which the title reverts in the grantor.<sup>4</sup> But the payment of a mortgage upon the land may be made an express condition, and when so intended it will be enforced by forfeiture.<sup>5</sup> In that case there is a breach of the condition in case the grantee suffers the mortgage to remain undischarged for several years after its maturity. Such a condition requires the grantee to relieve the property of the incumbrance within a reasonable time.<sup>6</sup>

**646.** A conveyance in consideration of support to be furnished the grantor or another person does not create a condition, unless apt words of condition are used,<sup>7</sup> and even then it will not be held to create a condition unless it is apparent from the whole instrument that a strict condition was intended. But courts of equity, it is declared, will freely rescind conveyances by parents

<sup>1</sup> *Berkley v. Union Pac. Ry. Co.* 33 Fed. Rep. 794, 795, per Brewer, J. See, however, *Close v. Burlington, &c. Ry. Co.* 64 Iowa, 149, 19 N. W. Rep. 886.

<sup>2</sup> *Wier v. Simmons*, 55 Wis. 637, 13 N. W. Rep. 873; *Powers v. Powers*, 28 Wis. 659; *Bugbee v. Sargent*, 23 Me. 269.

<sup>3</sup> *Xander's Est.* 7 Pa. Co. Ct. 482; *Hiesler v. Green*, 48 Pa. St. 96.

<sup>4</sup> *Martin v. Splivalo*, 69 Cal. 611, 11 Pac. Rep. 484; *Moore's Appeal*, 88 Pa. St. 450; *Cook v. Trimble*, 9 Watts, 15; *Dunlap v. Mobley*, 71 Ala. 102; *Schnyder v. Orr*, 149 Pa. St. 320, 24 Atl. Rep. 306, holding that the grantor may bring eject-

ment on such a clause as being a condition, is clearly bad law.

<sup>5</sup> *Ross v. Tremain*, 2 Met. 495; *Fisk v. Chandler*, 30 Me. 79.

<sup>6</sup> *Rowell v. Jewett*, 69 Me. 293; *Ross v. Tremain*, 2 Met. 495.

<sup>7</sup> *Cook v. Trimble*, 9 Watts, 15; *Ayer v. Emery*, 14 Allen, 67; *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. Rep. 1090; *Risley v. McNiece*, 71 Ind. 434; *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. Rep. 511; *Pownall v. Taylor*, 10 Leigh, 172, 34 Am. Dec. 725. And see *Ralphsnyder v. Ralphsnyders*, 17 W. Va. 28; *Joslyn v. Parlin*, 54 Vt. 670; *Weeks v. Boynton*, 37 Vt. 297; *Studdard v. Wells*, 120 Mo. 25, 25 S. W. Rep. 201.

to sons upon the breach of agreements to support;<sup>1</sup> but they will not enforce a forfeiture in such cases on slight grounds, and when the circumstances are such that it would be grossly inequitable to do so.<sup>2</sup>

If, however, it is apparent that the parties intended to make the furnishing of support a condition, this will be enforced by forfeiture.<sup>3</sup> If the condition be to furnish support or to pay a certain sum secured by mortgage, the grantee may perform either alternative; but when he has once made his election he is bound by it, and cannot afterwards choose the other alternative.<sup>4</sup>

A condition for support may be performed by another person than the grantee, unless the deed expressly provides that he shall personally furnish it.<sup>5</sup> The support need not be given or received upon the granted premises, unless there is an express provision therefor. It may be demanded or given at any reasonable place.<sup>6</sup>

**647. A reservation or provision in a deed poll that the grantee shall perform a certain service for the grantor, such as to build and maintain a certain fence, is made binding upon the grantee by his acceptance of the deed.**<sup>7</sup> "Where a grantee accepts a deed, and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing the instrument, he should be deemed to have entered into an express undertaking to do what the deed says he is to do; and such undertaking or obligation imposed upon and assumed by the grantee, if not technically a covenant running with the land,

<sup>1</sup> *Blake v. Blake*, 56 Wis. 392, 14 N. W. Rep. 173; *Delong v. Delong*, 56 Wis. 514, 14 N. W. Rep. 591; *Bresnahan v. Bresnahan*, 46 Wis. 385, 1 N. W. Rep. 39; *Bogie v. Bogie*, 41 Wis. 209.

<sup>2</sup> *Shade v. Oldroyd*, 39 Kans. 313, 18 Pac. Rep. 198.

<sup>3</sup> *Rowell v. Jewett*, 69 Me. 293; *Thomas v. Record*, 47 Me. 500; *Watters v. Bredin*, 70 Pa. St. 235; *Berryman v. Schumaker*, 67 Tex. 312, 3 S. W. Rep. 46; *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642; *Hitchcock v. Simpkins*, 99 Mich. 198, 58 N. W. Rep. 47; *Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515; *Spaulding v. Hallenback*, 39 Barb. 79;

*Thrall v. Spear*, 63 Vt. 266, 22 Atl. Rep. 414; *Alford v. Alford*, 1 Tex. Civ. App. 245, 21 S. W. Rep. 283.

<sup>4</sup> *Bryant v. Erskine*, 55 Me. 153.

<sup>5</sup> *Joslyn v. Parlin*, 54 Vt. 670; *Henry v. Tupper*, 29 Vt. 358; *Wilson v. Wilson*, 38 Me. 18.

<sup>6</sup> *Pettee v. Case*, 2 Allen, 546; *Wilder v. Whittemore*, 15 Mass. 262; *Thayer v. Richards*, 19 Pick. 398.

<sup>7</sup> *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. Rep. 482; *Newell v. Hill*, 2 Met. 180; *Rogers v. Fire Co.* 9 Wend. 611; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556.



is nevertheless an agreement of the grantee, evidenced by his acceptance of the deed, which might bind him and his personal representatives, and, by express words, his heirs and assigns."<sup>1</sup> Such a provision is not a reservation out of the estate granted, nor is it generally a condition upon which the estate is to be held, nor even a covenant running with the land, or otherwise. It is usually merely a personal agreement of the grantee, made as part of the consideration of the grant, which binds him and his legal representatives, and is not an incumbrance upon the land.<sup>2</sup>

Where a deed of land contained a reservation of pasturage for two cows during the lifetime of the grantor, or, in lieu thereof, the grantee's personal obligation to fit her yearly fuel for the stove, a stipulation in aid of the reservation, that the grantee "is not" to incumber or convey the land meantime, does not create an estate on condition.<sup>3</sup>

A clause in a deed poll, to 'the effect that the grantee agrees for himself, and for his heirs and assigns, that he and they will make and forever maintain a fence all around the granted premises, is of the same effect as an express covenant signed and sealed by the grantee. It runs with the land, and creates an incumbrance upon the land. By implication it recognizes that a subsequent grantee would be liable to the original grantor, in an action of assumpsit, for non-performance of the stipulation.<sup>4</sup>

A provision in the form of an express condition in a deed for land within a city to be used as a cemetery that "the grantee, his successors and assigns, shall at all times maintain a good and sufficient fence around the premises," should be construed as a covenant, and not as creating a condition subsequent, where it is evident that the grantor, who owned lands on both sides, sought to impose a duty on the grantee to build all the fence inclosing the cemetery.<sup>5</sup>

<sup>1</sup> *Hickey v. Lake Shore, &c. Ry. Co.* (Ohio) 36 N. E. Rep. 672.

<sup>2</sup> *Parish v. Whitney*, 3 Gray, 516; *Plymouth v. Carver*, 16 Pick. 183.

<sup>3</sup> *Bray v. Hussey*, 83 Me. 329, 22 Atl. Rep. 220.

<sup>4</sup> *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

<sup>5</sup> *Scovill v. McMahon*, 62 Conn. 378, 26

Atl. Rep. 479. The deed contained the following provision: "Provided, and this deed is upon the condition, that the above-described premises are to be used and occupied for the purpose of a burying ground, and no other purpose; and that the grantee, his successors and assigns, shall at all times maintain, build, and keep a good and sufficient fence around said premises." The court held, in regard

CONDITIONS SUBSEQUENT NOT FAVORED IN LAW. [§ 648.

A grantor in a deed to a railroad company, in consideration of a sum of money and of its building its railroad, conveyed to a company, its successors or assigns, forever, in fee simple, the right of way through his land, and added in the deed the words: "It is hereby agreed and understood a depot and station is to be located and given to said grantor on the land or strip above conveyed, to be permanently located for the benefit of said grantor and his assigns, and to be used for the general purposes of the railroad company." It was held that the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land, and became obligatory upon any second company which became the purchaser, under proper legal direction, of the rights, privileges, franchises, and property of the former.<sup>1</sup>

648. But a service to be performed by the grantee may be imposed as a condition, in which case a forfeiture may follow a breach of it. Whether the grantee alone is bound to perform the service, or whether his heirs and assigns are also bound, depends upon the terms of the condition. Thus, where land was conveyed to the grantee, his heirs and assigns forever, upon condition that the grantee should forever maintain at his own expense a fence on the line of the land conveyed, it was held that the condition bound the grantee alone, and not his heirs and assigns, because they were not specially named in the condition.<sup>2</sup> The condition, therefore, cannot be broken after the death of the grantee. His heirs are under no obligation to do anything in consequence of the condition.

to the provision for the use of the property as a cemetery, that, as apt words for the creation of a condition were employed, it was a reasonable inference, under all the circumstances, that the grantor intended that the property should revert if the grantee failed to use it for the purpose designated. "But, in the absence of any express provision for reëntry or forfeiture, we think it is not unreasonable to conclude that the parties did not intend that, while the land was in use as a place of burial, and while it was filled with graves and monuments, it should revert to the grantor upon the failure of the grantee to maintain a fence. The description of

the property shows that the grantor owned the land on two sides of the lot conveyed. He evidently desired to relieve himself from the burden of maintaining any part of the fence, and to impose the duty upon the grantee of building all the fence inclosing the premises. This, we think, was his entire purpose, and that this provision should be construed as a covenant, and not as creating a condition subsequent."

<sup>1</sup> Georgia So. R. Co. v. Reeves, 64 Ga. 492. See Countryman v. Deck, 13 Abb. N. C. 110.

<sup>2</sup> Emerson v. Simpson, 43 N. H. 475, 82 Am. Dec. 168; Page v. Palmer, 48 N. H. 385.

A railway company made a deed poll of land lying along its right of way, "subject to the condition that the said grantee, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the railway as now located, . . . which condition and obligation shall be perpetually binding on the owners of the land." It was held that the undertaking to perform the condition ran with the land, and bound subsequent purchasers from the grantor so long as they remained the owners, but that the railroad company would not have any right of action against its grantee for a non-performance of the condition after he had conveyed the land in fee to others.<sup>1</sup> The court said: "The meaning of the condition, we think, was to place upon the grantee an obligation to make and maintain the fences only during the time he was the owner of the land. At his death his heirs, upon succeeding to the ownership, would be held to make and maintain the fences while their ownership lasted. If he or his heirs or devisees should sell the land, the assignees would likewise be held while they continued to be owners, the obligation thus running with the land. Manifestly, it was not the grantee's intention to assume an obligation *in perpetuam*, and after having sold and conveyed the premises in fee, to remain bound for life, and his heirs to be bound after his death, to build and keep up the fences between the right of way and the land sold; and in getting at the intention of the railway company the obvious inference would be that the company would naturally provide for a recourse to those who might own the land at the time the fences needed repairing or rebuilding, rather than to its grantee and his heirs, who might perhaps at the time be dead, or unable to be found. We cannot but conclude that the company intended, when the land was conveyed, to trust to the land and its owners for a performance of the condition contained in the deed, and not to its grantee after he had ceased to be the owner. The fact that the company imposed the condition that the grantee and 'his assigns' should make and maintain the fences, and added thereto that the condition or obligation should be perpetually binding on 'the owners of the land,' would indicate an intention to make ownership the test as to who should be bound to perform the condition in the deed."

<sup>1</sup> *Hickey v. Lake Shore, &c. Ry. Co. (Ohio)* 36 N. E. Rep. 672.

IV. *Not implied from the Purpose of the Grant.*

649. A declaration of the purpose for which a conveyance is made, or for which the granted land is to be used, does not render the grant conditional. Thus, a grant of land "for a burying-place forever" will not be construed as a grant on a condition subsequent, where there are no other words indicating an intent that the grant shall be void if the declared purpose is not fulfilled.<sup>1</sup> As said in the Duke of Norfolk's Case, words *eo intentione* do not make a condition, but a confidence and trust.<sup>2</sup> As creating a trust or covenant they may, if properly expressed, be

<sup>1</sup> Rawson v. School Dist. 7 Allen, 125, 83 Am. Dec. 670. And see Stearns v. Palmer, 10 Met. 32; Bigelow v. Barr, 4 Ohio, 358; Watterson v. Ury, 5 Ohio C. C. 347; Methodist Prot. Ch. v. Laws, 7 Ohio C. C. 211; Brown v. Caldwell, 23 W. Va. 187, 48 Am. Rep. 376; Noyes v. St. Louis, &c. R. Co. (Ill.) 21 N. E. Rep. 487; Portland v. Terwilliger, 16 Oreg. 465, 19 Pac. Rep. 90; Scoville v. McMahon, 62 Conn. 378, 26 Atl. Rep. 479; Coffin v. Portland, 16 Oreg. 77; Kirk v. King, 3 Pa. St. 436; Scheetz v. Fitzwater, 5 Pa. St. 126; First M. E. Church v. Old Columbia Public Ground Co 103 Pa. St. 609; Cook v. Trimble, 9 Watts, 15; Union Canal Co. v. Young, 1 Whart. 410; Perry v. Scott, 51 Pa. St. 119; Lyon v. Hersey, 103 N. Y. 264; Olcott v. Gabert, 86 Tex. 121, 23 S. W. Rep. 985; Miller v. Tunica Co. 67 Miss. 651, 7 So. Rep. 429.

In Rawson v. School District, 7 Allen, 125, 83 Am. Dec. 670, Chief Justice Bigelow said: "It is sometimes said that the words *causa* and *pro*, when used in deeds, create a condition; that is, where a deed is made in express terms for a specific purpose, or in consideration of an act to be done or service rendered, it will be interpreted as creating a conditional estate. But this is an exception to the general rule, and is confined to cases where the subject-matter of the grant is in its nature executory, as of an annuity to be paid for service to be rendered or a right or privilege to be

enjoyed; in such case, if the service be not performed, or the enjoyment of the right or privilege be withheld which formed the consideration of a grant, the grantor will be relieved from the further execution of the grant, to wit, the payment of the annuity. Shep. Touch. 124; Cowper v. Andrews, Hob. 41; Co. Litt. 204 a. But ordinarily the failure of the consideration of a grant of land, or the non-fulfilment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate. The reason for this distinction between the two classes of cases is, as stated by Coke, 'that the state of the land is executed and the annuity executory.' Co. Litt. 204 a. . . . We believe there is no authoritative sanction for the doctrine that a deed is to be construed a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature for the general public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

Contrary to the rule, and not good law now, see Hunt v. Beeson, 18 Ind. 380; Indianapolis, &c. Ry. Co. v. Hood, 66 Ind. 580; Cleveland, &c. Ry. Co. v. Coburn, 91 Ind. 557; Horner v. Chicago, M. & St. P. Ry. Co. 38 Wis. 165.

<sup>2</sup> Dyer, 138 b.

enforced, but not as creating a condition. Thus, the words expressing the purpose of a grant to be "for a burying-place forever" may be sufficient to raise a trust for that purpose, but they are too equivocal to create a condition subsequent. Such a condition will not be raised by inference or implication merely.<sup>1</sup>

A deed of land to be used for certain purposes only, which also provides that, if it is used for other purposes, a stipulated sum shall be paid the grantor in addition to the original consideration, creates a condition which is discharged by payment or tender of such sum.<sup>2</sup>

Minuteness of direction concerning the administration of property conveyed to a public use is insufficient to take the case out of the rule, that the mere expression of a purpose or particular use to which property is to be appropriated will not make the estate a conditional one.<sup>3</sup>

650. Especially if the purpose for which the property is to be used is in its nature public and general, no condition will be implied, and possibly not even raised, by the use of words of condition, if the language of the deed does not indicate an intent that the grant is to be void if the declared purpose is not fulfilled, but rather indicates a trust to be enforced.<sup>4</sup> Thus, a conveyance

<sup>1</sup> *Rawson v. School Dist.* 7 Allen, 125, 83 Am. Dec. 670; *Packard v. Ames*, 16 Gray, 327; *Wilkes Barre v. Wyoming Hist. Soc.* 134 Pa. St. 616, 19 Atl. Rep. 809; *Bigelow v. Barr*, 4 Ohio, 358; *Kilpatrick v. Mayor (Md.)*, 31 Atl. Rep. 805; *Neely v. Hoskins*, 84 Me. 386, 24 Atl. Rep. 882.

<sup>2</sup> *Board of Education v. Trustees*, 63 Ill. 204.

<sup>3</sup> *Board of Com'rs v. Young*, 59 Fed. Rep. 96, 105, per Lurton, J.

<sup>4</sup> *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Rawson v. School Dist.* 7 Allen, 125, 83 Am. Dec. 670; *Ayer v. Emery*, 14 Allen, 70; *Field v. Providence*, 17 R. I. 803, 24 Atl. Rep. 143; *Coffin v. Portland*, 16 Oreg. 77, 17 Pac. Rep. 580; *Horne v. Chicago, M. & St. P. Ry. Co.* 38 Wis. 165, 175; *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. Rep. 442; *School Township v. School Town of Macy*, 109

Ind. 559, 10 N. E. Rep. 578; *Wilkes Barre v. Wyoming Hist. Soc.* 134 Pa. St. 616, 19 Atl. Rep. 809; *Greene v. O'Connor (R. I.)*, 25 Atl. Rep. 692; *Methodist Protestant Church v. Laws*, 7 Ohio C. C. 211; *Watterson v. Ury*, 5 Ohio C. C. 355.

*A grant of land to a county*, upon the sole consideration that the county seat had been established in the town where the land was situated, does not create a condition upon which the land will revert to the grantor upon a removal of the county seat. *Sumner v. Darnell*, 128 Ind. 38, 27 N. E. Rep. 162; *Adams v. Logan Co.* 11 Ill. 336; *Harris v. Shaw*, 13 Ill. 456; *Kerlin v. Campbell*, 15 Pa. St. 500; *Gadberry v. Sheppard*, 27 Miss. 203; *Miller v. Tunica Co.* 67 Miss. 651, 7 So. Rep. 429; *Warren Co. v. Patterson*, 56 Ill. 111; *Poitevent v. Hancock Co.* 58 Miss. 810; *Gilmore v. Hayworth*, 26 Tex. 89.

*A grant for a school, college, or a like institution, and for no other purpose, does*

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of land for a valuable consideration, in trust for the use of the inhabitants of a county, to accommodate the public service of the county, was held not to be defeated on a sale and conveyance by

not create a condition. *Kirk v. King*, 3 Pa. St. 436; *Raley v. Umatilla Co.* 15 Oreg. 172, 13 Pac. Rep. 890; *Heaston v. Randolph Co.* 20 Ind. 398; *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. Rep. 442; *Curtis v. Topeka*, 43 Kans. 138, 23 Pac. Rep. 98; *Wilkes Barre v. Wyoming Hist. Soc.* 134 Pa. St. 616, 19 Atl. Rep. 809, 26 W. N. C. 247; *Newbold v. Glenn*, 67 Md. 489, 10 Atl. Rep. 242; *Lawe v. Hyde*, 39 Wis. 345; *Taylor v. Binford*, 37 Ohio St. 262; *Chapin v. School Dist.* 35 N. H. 445; *Barker v. Barrows*, 138 Mass. 578. In *Newpoint Lodge v. Newpoint*, 138 Ind. 141, 37 N. E. Rep. 650, it was held that a deed which "conveys and warrants" a parcel of land to a town "for the use of the common schools" passes the fee free from condition.

A grant of land for religious purposes, or church purposes only, does not create a condition. *Taylor v. Binford*, 37 Ohio St. 262; *Packard v. Ames*, 16 Gray, 327; *Carter v. Branson*, 79 Ind. 14; *Cook v. Leggett*, 88 Ind. 211; *Schipper v. St. Palais*, 37 Ind. 505; *Baldwin v. Atwood*, 23 Conn. 367; *Erwin v. Hurd*, 13 Abb. N. C. 91; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. Rep. 9, 57 Am. Rep. 59; *Cushman v. Church*, 14 Pa. Co. Ct. 26; *Griffitts v. Cope*, 17 Pa. St. 96; *Brendle v. German Ref. Cong.* 33 Pa. St. 415; *Strong v. Doty*, 32 Wis. 381.

A deed to the bishop of a Roman Catholic church for the benefit of the church vests the complete legal title in the bishop, and the land is not forfeited to the grantor by failure to occupy and use it for the church. *Gabert v. Olcott* (Tex. Civ. App.), 22 S. W. Rep. 286; *Olcott v. Gabert*, 86 Tex. 121, 23 S. W. Rep. 985.

A deed to the trustees of a church "in trust for said church, and for the sole use and behoof of the congregation" organized to build thereon and worship in said building, gives the grantor no right to object to a sale of the lot by the church

to pay off a mortgage on a lot thereafter acquired for a church edifice. *In re United Presb. Ch. (Pa.)* 30 Atl. Rep. 1012.

Where a devise was made to a religious society, "to be and to remain to the use and benefit of said society and their successors forever, . . . provided that said real estate be not ever hereafter sold or disposed of, but the same may be leased or let, and the annual rents or profits applied to the use and benefit of the society," the Supreme Court held that the estate was not a conditional one, and that the supposed conditions were to be regarded as mere "limitations in trust." *Stanley v. Colt*, 5 Wall. 119.

So a grant of land for a public square, or other public purpose, without an express condition. *Thornton v. Trammell*, 39 Ga. 202; *Wilkes Barre v. Wyoming Soc.* 134 Pa. St. 616; *Scantlin v. Garvin*, 46 Ind. 262; *Warren v. Lyons City*, 22 Iowa, 351; *Wellington v. Wellington*, 46 Kans. 213, 26 Pac. Rep. 415; *Flaten v. Moorhead*, 51 Minn. 518, 53 N. W. Rep. 807, where the provision was enforced as a restriction. A grant of land to a city "as and for a street, to be kept as a public highway," does not create a condition subsequent so as to work a forfeiture in case the property is not maintained as a public street. *Kilpatrick v. Mayor (Md.)*, 31 Atl. Rep. 805.

So a grant for a railroad depot or station, or other specified purpose of the road. *Noyes v. St. Louis, &c. R. Co. (Ill.)* 21 N. E. Rep. 487; *Morrill v. Wabash, &c. Ry. Co.* 96 Mo. 174, 9 S. W. Rep. 657; *Kenney v. Wallace*, 24 Hun, 478; *Thornton v. Trammell*, 39 Ga. 202.

The following cases to the contrary not considered sound law: *Horner v. Chicago, M. & St. P. Ry. Co.* 38 Wis. 165; *Cleveland, &c. Ry. Co. v. Coburn*, 91 Ind. 557; *Indianapolis, &c. Ry. Co. v. Hood*, 66 Ind. 580.

the vendees, whereby the use for the public service ceased.<sup>1</sup> And so where a conveyance was made to a county in fee simple, for the purpose of erecting thereon a court-house, jail, and county offices, and the county was subsequently divided, the seat of justice moved therefrom, the land sold and used for other purposes, and the proceeds thereof divided between the two counties, it was held that the title did not revert to the heirs of the original owners.<sup>2</sup> A deed of land for the sole use of a water company as a reservoir passes a title in fee simple, not determinable on the cessation of the use of the land for that purpose. Chief Justice Mercur said: "No restraint was imposed on an alienation of the land. . . . No clause provided for a forfeiture or termination of the estate in case the land ceased to be used as a reservoir. No right of reëntry was reserved by the grantor on any contingency. No technical word to create a condition was used. No other words were used equivalent thereto, or proper to create a condition. The authorities show that the recital of the consideration, and a statement of the purpose for which the land is to be used, are wholly insufficient to create a conditional estate."<sup>3</sup>

651. When the purpose is public and general, and does not inure specially to the benefit of the grantor, no condition is created, though such in form, in the absence of an express reservation of a right to reënter on a failure of the grantee to use the land in the manner provided. Thus, where land was conveyed to a city "on condition that it shall be forever kept open and used as a public highway, and for no other purpose," it was held that this clause merely declared the purpose of the conveyance, and was not a condition subsequent. "Such a declaration," say the court,<sup>4</sup> "does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified. It matters not that the statement of the purpose for which the land was conveyed is in the form of a condition. The employment of apt words to create a condition does not necessarily and invariably have that effect, for these may give way

<sup>1</sup> Kerlin v. Campbell, 15 Pa. St. 500.

<sup>2</sup> Seebold v. Shitler, 34 Pa. St. 133. The Pennsylvania court has always adhered to the rule that "the mere expression of a purpose will not, of and by itself, debase a fee."

<sup>3</sup> First Methodist Church v. Old Columbia Public Ground Co. 103 Pa. St. 608, 614.

<sup>4</sup> Greene v. O'Connor, 18 R. I. 49, 25 Atl. Rep. 692.

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to the intent of the party as ascertained by a construction of the instrument."

652. When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto. Such is the law declared by statute in Michigan<sup>1</sup> and Minnesota.<sup>2</sup>

A conveyance was made of a parcel of land with a church edifice thereon, for a consideration not extremely inadequate under the circumstances for the interest actually conveyed, "upon the condition that the property shall be forever held for the use of the Protestant Episcopal Church in Old Town." The church after a time abandoned the property and allowed it to fall into decay.

<sup>1</sup> Howells' Annot. Stats. 1882, § 5562; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168.

<sup>2</sup> G. S. 1878, ch. 45, § 46; G. S. 1891, § 3956; G. S. 1894, § 4407. See *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 51 N. W. Rep. 905. This statute was interpreted by the court, Dickinson, J., saying: "It may be apparent, from the very nature of the condition, that it was not intended to confer or reserve any real benefit to the grantor or to any other person. Such, for instance, would be a condition, annexed to the granting of a fee, that the grantee should yearly deliver an ear of corn to the grantor, or render any specified but unsubstantial service. To such a case the statute would apply. Again, a condition may be such that proof beyond the deed itself would be necessary to disclose the fact whether the expressed condition was or was not substantially beneficial. We will suppose that the owner of a lot conveys it with the express condition that no building shall be erected on it for a period of ten years. It cannot be said from its terms that this condition was not reasonably intended to be, or that it was not, actually beneficial to the grantor. To such a case, no more being shown, the statute is not

applicable. The court cannot declare the condition to be "merely nominal," and to "evince no intention of actual or substantial benefit." It requires that the court be further informed as to facts not disclosed by the deed before it can declare the condition, to which the parties have solemnly agreed, to be of no legal effect. If the grantor should be found to own adjoining lands, which were so improved that the erection of a building upon the granted lot would seriously impair their value and usefulness, the condition would, without doubt, be valid. On the other hand, the grantee, to defeat the condition, might show that the grantor had no actual or prospective interest in the adjoining premises, was in no manner concerned in them or in their use, and that they were unimproved. He might thus show himself entitled to the benefit of the statute, if, indeed, the statute confers any benefit beyond what the common law would give." The case holds that a condition that intoxicating liquor shall not be sold on the granted land cannot be declared to be "merely nominal" in the absence of any proof that the plaintiff had no special interest in the observance of the condition. The court dissent from the case of *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168.



It was held that the conveyance was not upon a condition that could be the foundation for a forfeiture to the grantor or his heirs, but merely created a trust for the benefit of the church and enforceable in equity only in its behalf.<sup>1</sup>

But where a deed, after conveying a tract of land, described a narrow strip of land which was also conveyed, "for a road to and from said premises first above described," the question was whether, in view of this clause, the deed conveyed an absolute fee, a conditional fee, or a mere easement, in the strip of land described. This had to be determined from the language of the deed itself, unaided by anything else. The deed in terms conveyed, not an easement in the land, but the land itself, with an attempted restriction upon its use, if it be considered such, which is entirely consistent with the passing of the fee. There was nothing in the deed reserving to the grantor any use of, or dominion over, the land; and the court held that these words of themselves were not sufficient either to limit the grant of the second tract to an easement, or to create a condition subsequent.<sup>2</sup>

653. The limitation of the use of the property may indicate an easement rather than a condition. Thus a conveyance to a plank-road company, "for the use of a plank road," was held to create an easement, and the principal reasons assigned for so holding were that the land conveyed was a strip through the grantor's entire farm; that the grantee was already in occupation of the premises; that the only possible use to which it could put the premises was for its road; and that the consideration expressed in the deed was grossly inadequate for a grant in fee.<sup>3</sup>

An easement was clearly created where the conveyance expressly declared, not only that the land was deeded for use as an alley, but also that the grant should be null and void whenever the premises ceased to be kept for this purpose.<sup>4</sup>

An easement is created by a conveyance of a right of way to a railroad company for a nominal consideration, although the grant is expressed to be upon condition that the land shall be used for railroad purposes only, and that if it shall cease to be used for such purposes it shall revert to the grantor.<sup>5</sup>

<sup>1</sup> Neely v. Hoskins, 84 Me. 386, 24 Atl. Rep. 882.

<sup>2</sup> Soukup v. Topka, 54 Minn. 66, 55 N. W. Rep. 824.

<sup>3</sup> Robinson v. Missisquoi R. Co. 59 Vt. 426, 10 Atl. Rep. 522.

<sup>4</sup> Sanborn v. Minneapolis, 35 Minn. 314, 29 N. W. Rep. 126.

<sup>5</sup> Lake Erie & W. R. Co. v. Ziebarth

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Words describing the purpose for which a conveyance is made are frequently limitations upon the use that is to be made of the property, and not conditions upon which it is to be held, unless there are apt words of condition or an express provision for a reverter.<sup>1</sup>

A provision in a deed, expressed as a condition, that the grantee and his heirs shall allow the grantor and his heirs free access with teams to and from the waters of Hempstead harbor by the road now and heretofore used through his land, does not constitute a condition subsequent, but annexes the right of way as an easement to the land of the grantor, and is an exception or reservation in his favor.<sup>2</sup>

Where one, for a nominal consideration, conveyed land to a city "to be forever held and used as a public park," it was held that the city acquired a qualified and not an absolute fee in the land, and could be restrained from using the land for any other purpose.<sup>3</sup>

**654.** A different rule applies as to devises for purposes declared, for it is held that the testator's words expressing his intention in making the devise, or the purpose for which he makes it, may create a conditional estate. The same words used by a grantor in a deed would not make a condition unless the grant is purely voluntary, and there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created.<sup>4</sup>

**655.** If the declared purpose of a conveyance be such that it will inure specially to the benefit of the grantor, the grant

(Ind.), 33 N. E. Rep. 256, 6 Ind. App. 228. See, also, *Ingalls v. Byers*, 94 Ind. 134; *Douglass v. Thomas*, 103 Ind. 187; *Nichols v. N. E. Furniture Co.* 100 Mich. 230, 59 N. W. Rep. 155; *Soukup v. Topka*, 54 Minn. 66, 55 N. W. Rep. 824; *Robinson v. Missisquoi R. Co.* 59 Vt. 426, 10 Atl. Rep. 522.

<sup>1</sup> *Curtis v. Topeka*, 43 Kans. 138, 23 Pac. Rep. 98.

<sup>2</sup> *Baker v. Mott*, 78 Hun, 141, 28 N. Y. Supp. 968.

<sup>3</sup> *Flaten v. Moorhead*, 51 Minn. 518, 53 N. W. Rep. 807. In *Soukup v. Topka*, 54 Minn. 66, 69, 55 N. W. Rep. 824, *Mitchell, J.*, commenting upon this case,

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said: "While we do not decide whether this conveyed a conditional fee or a mere easement, the controlling considerations, aside from the language of the deed, which led us to hold that it did not convey an absolute fee, were that the grantee was a municipal corporation, and the consideration named in the deed merely nominal."

<sup>4</sup> *Duke of Norfolk's Case*, Dyer, 138 b; *Portington's Case*, 10 Coke, 42 a; *Rawson v. School District*, 7 Allen, 125, 128, 83 Am. Dec. 670; *Laberee v. Carleton*, 53 Me. 211; *Bray v. Hussey*, 83 Me. 329, 22 Atl. Rep. 220, per *Haskell, J.*

may be void if the declared purpose is not fulfilled. Thus, where a strip of land adjoining the county jail was conveyed to a county in fee, to and for the uses and purposes following, to be and remain forever unbuilt upon, in order to prevent the escape of prisoners, the grantor reserved to himself "the free use of the premises so granted for an open yard, garden, or grass plot, with the rents, issues, and profits." The object was to secure an open space adjoining the prison walls. This object was accomplished by a conveyance which, though it vested the fee, yet was so specific in defining the purpose for which the fee was conveyed, and so clear in reserving to the grantor the use of the premises subject to the space being kept open, that although the deed contained no express clause of reëntry upon abandonment by the grantee, yet it was clear that the fee was a base or determinable one. It was accordingly held that the estate was determined on the removal of the prison to another site and the sale of the land, so that it ceased to be used for the purpose of a county jail.<sup>1</sup>

656. But if the purpose for which a conveyance is made, or the land conveyed is to be used, is declared in the form of an express condition, especially if a provision for a reverter in case it is not so used is added, the property will revert upon breach of the condition, as where the proviso was that a schoolhouse

<sup>1</sup> *Siegel v. Herbine* (Pa.), 23 Atl. Rep. 996, stated and approved by Lurton, J., in *Board of Com'rs v. Young*, 59 Fed. Rep. 96, 102, the learned justice saying: "The case is authority only for the proposition that technical words importing an estate determinable upon a condition subsequent are not always essential, if the clear intent of the parties is shown by the whole scope of the instrument to be that the estate shall determine upon the cessation of the use defined." He also quotes Chief Justice Bigelow, in *Rawson v. School District*, 7 Allen, 125, 83 Am. Dec. 670, who said: "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not

inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

To like effect is *Olcott v. Gabert*, 86 Tex. 121, 125, 23 S. W. Rep. 985. Gaines, J., delivering the opinion, said: "When the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when, as in this case, the use is for the benefit of a special class of persons, or of the public at large. In this case it does not appear that the maintenance of a church upon the lots was a matter specially advantageous to the railway company, who made the grant."

should be erected upon the land;<sup>1</sup> or where a grant was made to trustees to build a house of worship, to hold as long as they should so use it and no longer;<sup>2</sup> or that the land should be used as a site for a court-house;<sup>3</sup> or that the grantee's husband should accept the conveyance and live upon the land conveyed, making it a home for his family;<sup>4</sup> or that a railroad station should be permanently located upon the land;<sup>5</sup> or that the land should be used as a burial ground;<sup>6</sup> or that it should be for certain specified uses of a religious society, and for no other use whatever;<sup>7</sup> or that a building for municipal purposes should be erected within a time specified.<sup>8</sup>

657. A condition to abstain from doing an act which is perfectly proper and legal in itself is not for this reason invalid. "Indeed, the acts against which conditions are aimed are commonly legal acts, the performance of which could not be restrained otherwise than by some form of contract; and the right to stipulate for the purpose is limited only by considerations of public policy."<sup>9</sup> The grantor may restrict the use of the land as it may seem to be for his advantage. He may make it a condition that the land shall not be used for a schoolhouse, a distillery, a blast furnace, a livery stable, a machine-shop, a hospital, a cemetery.<sup>10</sup> "There are many things which may be provided for as conditions in a deed, which, though of small consideration in the view of a stranger, may be thought of great importance by the grantor."<sup>11</sup>

A condition not to sell or permit the sale of intoxicating liquors on the granted premises is valid though the sale of liquor

<sup>1</sup> *Hayden v. Stoughton*, 5 Pick. 528; <sup>5</sup> *Cleveland, &c. Ry. Co. v. Coburn*, 91 Wood v. Cheshire Co. 32 N. H. 421; Ind. 557.

*Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. Rep. 927; *Rowe v. Minneapolis*, 49 Minn. 148, 51 N. W. Rep. 907; *Carpenter v. Graber*, 66 Tex. 465, 1 S. W. Rep. 178; *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243; *Pepin Co. v. Prindle*, 61 Wis. 301, 21 N. W. Rep. 254.

<sup>2</sup> *Henderson v. Hunter*, 59 Pa. St. 335; *Spies v. Rome, &c. R. Co.* 15 N. Y. Supp. 348.

<sup>3</sup> *Spies v. Rome, &c. R. Co.* 15 N. Y. Supp. 348.

<sup>4</sup> *Odell v. Cannon*, 79 Ga. 515, 4 S. E. Rep. 558.

<sup>5</sup> *Reed v. Stouffer*, 56 Md. 236; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. Rep. 479.

<sup>6</sup> *Second Universalist Soc. v. Dugan*, 65 Md. 460, 5 Atl. Rep. 415.

<sup>7</sup> *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243.

<sup>8</sup> *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391, per Cooley, C. J.; *Owsley v. Owsley*, 78 Ky. 257; *Sperry v. Pond*, 5 Ohio, 387, 24 Am. Dec. 296.

<sup>9</sup> *Plumb v. Tubbs*, 41 N. Y. 442, 446; *Craig v. Wells*, 11 N. Y. 315.

<sup>10</sup> *Gray v. Blanchard*, 8 Pick. 284.

is tolerated by the State; at least if the grantor has any special and substantial interest in the enforcement of the condition.<sup>1</sup>

### V. *Void Conditions.*

**658. Conditions in conflict with public policy, or inhibiting the performance of acts which the public has an interest in having performed, are void.**<sup>2</sup>

A condition in a conveyance to a county, city, or town, that a public building shall be erected and maintained upon the land, is not contrary to public policy.<sup>3</sup> Such a condition is not in the nature of a bribe to the voters. The location of a public building, such as a court-house, is purely one of convenience and material advantages, and does not tend to influence the courts or officers in the discharge of any public duty.

Where land is acquired by a town upon the express condition that it shall erect a building upon it within a time limited, a failure to fulfil the condition is not excused for the reason that the town is not possessed of sufficient means with which to build the proposed structure.<sup>4</sup>

<sup>1</sup> *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 51 N. W. Rep. 905; *Collins Manuf. Co. v. Marcy*, 25 Conn. 242; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168; *Plumb v. Tubbs*, 41 N. Y. 442; *Post v. Weil*, 8 Hun, 418; *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115; *O'Brien v. Wetherell*, 14 Kans. 616; *Cowell v. Colorado Springs Co.* 3 Colo. 82, 100 U. S. 55; *Jeffery v. Graham*, 61 Tex. 481.

<sup>2</sup> *Patterson v. Donner*, 48 Cal. 369, where the condition was that the grantee should procure two witnesses to testify to a certain state of facts; *Wheeler v. Moody*, 9 Tex. 372, where the condition was for the support of a state religion, where such a religion had become illegal through a change in the policy of the law.

In California the Code provides that, if a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void and the right cannot exist. If it requires

the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect and the condition is void. Cal. Civ. Code, § 709. So in same terms in *North Dakota* and *South Dakota*: *Dak. Comp. Laws* 1887, § 2714. *Georgia*: *Code* 1882, § 2296, is to like effect. *Louisiana*: *Rev. Civ. Code* 1889, § 2031.

<sup>3</sup> *Harris v. Shaw*, 13 Ill. 456; *Adams v. Logan Co.* 11 Ill. 336; *Dishon v. Smith*, 10 Iowa, 212; *Twiford v. Alamahee Co.* 4 Gr. 60; *Hall v. Marshall*, 80 Ky. 552; *State v. Elting*, 29 Kans. 397; *Lucas Co. v. Hunt*, 5 Ohio St. 488, 67 Am. Dec. 303; *Pepin Co. v. Prindle*, 61 Wis. 301, 21 N. W. Rep. 254; *State v. Purdy*, 36 Wis. 213, 17 Am. Rep. 485; *State v. Supervisors*, 24 Wis. 49.

<sup>4</sup> *Clarke v. Brookfield*, 81 Mo. 503, 513, 51 Am. Rep. 243. "The question, as to whether municipal corporations have the right to accept gifts or acquire property burdened with conditions which require them to do reasonable things germane to the objects of their existence, or return the gift or acquisition to the grantor or

If, however, a municipal corporation be prohibited by statute from taking a conveyance upon condition, such a condition would be illegal and void.<sup>1</sup>

659. A condition in general restraint of marriage is void,<sup>2</sup> though most courts hold that such a condition will be upheld when there is a valid gift or limitation over;<sup>3</sup> and a conveyance to a person until marriage is clearly void, for in such case there is nothing to carry the gift beyond the marriage.<sup>4</sup> A condition that one shall not marry a particular person is valid.

A condition that a daughter shall not marry until she arrives at the age of twenty-one is lawful. This is a proper and reasonable provision, and its violation may well work a forfeiture of the estate.<sup>5</sup> A condition that a legatee, if under twenty-one years, shall marry with the consent of her mother is valid.<sup>6</sup>

In a deed of gift by a father to his daughter, a provision that the gift should stand if she remained single, otherwise the land should be divided among his three children, the grantee to have fifty dollars more than the others, is a condition in restraint of marriage in general and void; and the limitation over is void, for the land would go to the heirs in case of a forfeiture, whether there was a limitation or not.<sup>7</sup> A condition in a gift to a daughter, that if she should marry the estate should go to another, is void.<sup>8</sup>

his heirs, is hardly to be considered an open question in this country, where so much property is constantly being received and held in this manner." Per Martin, C.

<sup>1</sup> *Rogers v. Sebastian Co.* 21 Ark. 440.

<sup>2</sup> *California, North Dakota, and South Dakota*: Except upon the marriage of a minor. This provision does not affect limitations where the intent is, not to forbid marriages, but only to give the use until marriage. Civ. Code, § 710; Dak. Comp. Laws 1887, § 2715; *Jenkins v. Merritt*, 17 Fla. 304; *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281.

<sup>3</sup> *Parsons v. Winslow*, 6 Mass. 169, 181, 4 Am. Dec. 107.

<sup>4</sup> *Morley v. Rennoldson*, 2 Hare, 570, 580, per Wigram, V. C.; *Pringle v. Dunkley*, 14 Sm. & M. 16, 53 Am. Dec. 110;

*Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281. "Judge Story gives, as a reason why the condition is treated as ineffectual in case of not giving the estate over, that the testator is deemed to use the condition in *terrorem* only, or he would make some other disposition of the bequest provided the condition is not kept. Other reasons are also assigned by other writers. One reason is that courts cannot relieve against the forfeiture in such case without doing an injury to the person to whom the estate is limited over." Per Peters, J.

<sup>5</sup> *Shackelford v. Hall*, 19 Ill. 212.

<sup>6</sup> *Scott v. Tyler*, 2 Bro. C. C. 431.

<sup>7</sup> *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281.

<sup>8</sup> *Williams v. Cowden*, 13 Mo. 211, 53 Am. Dec. 143.

§§ 660, 661.] CONDITIONS PRECEDENT AND SUBSEQUENT.

660. A condition in restraint of alienation general as to time and persons is void.<sup>1</sup> As Littleton says: <sup>2</sup> "If a feoffment be made upon this condition that the feoffee shall not alien the land to any, this condition is void, because, when a man is so enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all power which the law gives him, which should be against reason and therefore such a condition is void." This is a principle founded in natural law. Aristotle has it that, "It is the definition of property to have in one's self the power of alienation." Grotius says: "Since the establishment of property, men who are masters of their own goods have by the law of nature the power of disposing of or of transferring all or any part of their effects to other persons, for this is the very nature of property, — I mean of full and complete property."<sup>3</sup>

A fee-simple estate and a restraint upon its alienation cannot in their nature coexist.<sup>4</sup> Such a condition is clearly repugnant to the grant in fee simple. A power of alienation is an inseparable incident of such an estate.

661. Under the feudal law, conditions in restraint of aliena-

<sup>1</sup> *Bradley v. Peixoto*, 3 Ves. Jr. 324; *Phil. Eq.* 61; *Munroe v. Hall*, 97 N. C. Co. Litt. 436; *Stukeley v. Butler*, Hob. 206; *Hardy v. Galloway*, 111 N. C. 519, 168; *Brandon v. Robinson*, 18 Ves. 429; 15 S. E. Rep. 890; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. Rep. 668. **North Dakota**: *Comp. Laws* 1887, § 2716. **Ohio**: *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602. **Pennsylvania**: *Reifsnnyder v. Hunter*, 19 Pa. St. 41; *Walker v. Vincent*, 19 Pa. St. 369; *Yard's App.* 64 Pa. St. 95; *Doebler's App.* 64 Pa. St. 9. **South Dakota**: *Comp. Laws* 1887, § 2716. **Texas**: *Bouldin v. Miller (Tex.)*, 28 S. W. Rep. 940, 26 S. W. Rep. 133. **Tennessee**: *Lawrence v. Singleton (Tenn.)*, 17 S. W. Rep. 265.

<sup>2</sup> Litt. 360; Co. Litt. 222 b.

<sup>3</sup> Grotius, b 1, c 6, § 1. These quotations are found in *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

<sup>4</sup> *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Murray v. Green*, 64 Cal. 363, 28 Pac. Rep. 118.

<sup>1</sup> *Bradley v. Peixoto*, 3 Ves. Jr. 324; *Phil. Eq.* 61; *Munroe v. Hall*, 97 N. C. Co. Litt. 436; *Stukeley v. Butler*, Hob. 206; *Hardy v. Galloway*, 111 N. C. 519, 168; *Brandon v. Robinson*, 18 Ves. 429; 15 S. E. Rep. 890; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. Rep. 668. **North Dakota**: *Comp. Laws* 1887, § 2716. **Ohio**: *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602. **Pennsylvania**: *Reifsnnyder v. Hunter*, 19 Pa. St. 41; *Walker v. Vincent*, 19 Pa. St. 369; *Yard's App.* 64 Pa. St. 95; *Doebler's App.* 64 Pa. St. 9. **South Dakota**: *Comp. Laws* 1887, § 2716. **Texas**: *Bouldin v. Miller (Tex.)*, 28 S. W. Rep. 940, 26 S. W. Rep. 133. **Tennessee**: *Lawrence v. Singleton (Tenn.)*, 17 S. W. Rep. 265.

<sup>2</sup> Litt. 360; Co. Litt. 222 b.

<sup>3</sup> Grotius, b 1, c 6, § 1. These quotations are found in *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

<sup>4</sup> *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Murray v. Green*, 64 Cal. 363, 28 Pac. Rep. 118.

tion were good wherever the grantor had the reversion. The feudal lord had the reversion. Upon the death of his grantee without heirs, the land reverted to the grantor or lord from whom it proceeded. "The grantee, during the whole period from the Conquest down to the 18 Edward I., when the statute of *quia emptores* was passed, could not alien his land without the license or consent of the lord, who was the owner of this reversionary interest."<sup>1</sup> This statute provided that from henceforth it shall be lawful for any freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as the feoffor held before. The effect of this statute was to change the tenure from the immediate to

<sup>1</sup> *De Peyster v. Michael*, 6 N. Y. 467, 497, 499, 57 Am. Dec. 470. Chief Justice Ruggles in this case fully and ably examines the subject of restraints upon alienation: "Restraints upon alienation of lands held in fee simple were of feudal origin. A feoffment in fee did not originally pass an estate in the sense in which we now understand it. The purchaser took only an usufructuary interest, without the power of alienation, in prejudice of the heir, or of the lord. In default of heirs, the tenure became extinct, and the land reverted to the lord. The heir took by purchase and independent of the ancestor, who could not alien, nor could the lord alien the seignior without the consent of the tenant. This restraint on alienation was a violent and unnatural state of things, contrary to the nature and value of property, and the inherent and universal love of independence. It arose partly from favor to the heir, and partly from favor to the lord; and the genius of the feudal system was originally so strong in favor of restraint upon alienation that, by a general ordinance mentioned in the book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off. . . . All the land in the kingdom is supposed, says Blackstone, to be holden mediately or immediately of the king, who is styled the lord paramount, or above all. Such tenants as held under the king im-

mediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king, and, thus partaking of a middle nature, were called mesne or middle lords. So that, if the king granted a manor to A, and he granted a portion of the land to B, now B was said to hold of A, and A of the king; or, in other words, B held his lands immediately of A, but mediately of the king. The king, therefore, was styled lord paramount; A was both tenant and lord, or was a mesne lord, and B was called tenant paravail, or the lowest tenant, being he who was supposed to make avail or profit of the land. Out of the feudal tenures or holdings sprung certain rights and incidents, among which were fealty and escheat. Both these were incidents of socage tenure, of which alone it is necessary to speak. Fealty was the obligation of fidelity which the tenant owed to his lord. Escheat was the reversion of the estate on a grant in fee simple upon a failure of the heirs of the owner. Fealty was annexed to and attendant on the reversion. They were inseparable. These incidents of feudal tenure belonged to the lord of whom the lands were immediately holden; that is to say, to him of whom the owner for the time being purchased."



§§ 662, 663.] CONDITIONS PRECEDENT AND SUBSEQUENT.

the superior lord, from the grantor to the king. It deprived the ordinary grantor of all power to impose any restraint on alienation. The statute did not apply to the king.<sup>1</sup>

**662.** The right of alienation has been an inseparable incident to an estate in fee ever since the statute *quia emptores*.<sup>2</sup> After an absolute conveyance in fee simple, a clause providing that the grantee shall not mortgage or dispose of the property is repugnant and void;<sup>3</sup> or that he shall not offer to mortgage or suffer a fine or recovery.<sup>4</sup> So is a clause prohibiting the grantee from conveying without the consent of the grantor.<sup>5</sup> A condition to alien only to a particular person or persons is void;<sup>6</sup> or that land devised to a number of persons shall not be divided;<sup>7</sup> or not to sell during the lifetime of the grantee.<sup>8</sup>

In some courts, however, it is held that a condition not to alien within a limited time is objectionable.<sup>9</sup>

The doctrine that a condition in restraint of alienation is void has no application when the condition is contained in a grant by the United States to certain Indians, as the purpose of the proviso in such case is not to prevent the alienation of the land, but to protect the Indians from an improvident disposition of the land.<sup>10</sup>

**663.** A condition that land conveyed shall not be subject to the grantee's debts is in restraint of alienation and void. Notwithstanding such condition, the land is subject to levy on

<sup>1</sup> The statute *quia emptores* was never in force in New York, and restraints upon alienation could be made until July 4, 1776, from which time the statutes of 1779 and 1787 took effect retrospectively. *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

<sup>2</sup> Co. Litt. 436.

<sup>3</sup> *Lawrence v. Singleton* (Tenn.), 17 S. W. Rep. 265; *Hall v. Tufts*, 18 Pick. 455; *Gleason v. Fayerweather*, 4 Gray, 348; *Walker v. Vincent*, 19 Pa. St. 369; *Laval v. Staffel*, 64 Tex. 370.

<sup>4</sup> *Ware v. Cann*, 10 Barn. & C. 433.

<sup>5</sup> Co. Litt. 223 a; *Shep. Touch.* 130; *Murray v. Green*, 64 Cal. 363, 28 Pac. Rep. 118; *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. Rep. 984.

<sup>6</sup> *Attwater v. Attwater*, 18 Beav. 330,

overruling *Gill v. Pearson*, 6 East, 173; *Schermerhorn v. Negus*, 1 Denio, 448.

<sup>7</sup> *Smith v. Clark*, 10 Md. 186.

<sup>8</sup> *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. Rep. 668; *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. Rep. 890.

<sup>9</sup> *Murray v. Green*, 64 Cal. 363, 28 Pac. Rep. 118, per *Sharpstein, J.*, examining and declaring inapplicable *Churchill v. Marks*, 1 Coll. 441, and *Large's Case*, 2 Leon. 82, cited in support of the proposition that such a condition is good. In *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61, it was declared that a condition that would suspend all power of alienation for a single day is void. To like effect, see *McCleary v. Ellis*, 54 Iowa, 311, 6 N. W. Rep. 571.

<sup>10</sup> *Pickering v. Lomax*, 145 U. S. 310, 12 Sup. Ct. Rep. 860.

execution, and passes to an assignee in bankruptcy.<sup>1</sup> Liability for debts is an incident of property, just as the right to convey it is.<sup>2</sup>

**664.** In a deed in fee simple a condition that if the grantee shall die seised of the land, or of any part of it, such land shall revert to the grantor or his heirs, is repugnant to the grant and void; and upon the death of the grantee the land goes to his heirs.<sup>3</sup>

In estates for life or for years, conditions in restraint of alienation are lawful. Such restraint is good by reason of a reversion remaining in the lessor.<sup>4</sup>

**665.** If the deed does not convey an estate in fee simple absolute, a provision that it shall revert to the grantor is not repugnant. Sometimes a deed, which upon its face seems to be void for repugnancy by reason of provisions restraining alienation, may be carried into effect if from the whole instrument the intention of the parties is manifest that the deed should not convey a fee simple absolute in the land; for even the strongest words of conveyance will not pass an estate if, from other parts of the

<sup>1</sup> *Graves v. Dolphin*, 1 Sim. 66; *Snowdon v. Dales*, 6 Sim. 524; *Blackstone Bank v. Davis*, 21 Pick. 42, 32 Am. Dec. 241; *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205, 6 N. W. Rep. 571; *Mebane v. Mebane*, 4 Ired. Eq. 131, 44 Am. Dec. 102; *Tillinghast v. Bradford*, 5 R. I. 205, where Ames, C. J., said: "Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit should be also amenable to the demands of justice."

<sup>2</sup> *Mebane v. Mebane*, 4 Ired. Eq. 131, 44 Am. Dec. 102, per Ruffin, C. J.

<sup>3</sup> *Attorney - General v. Hall*, Fitzg. 314; *Ide v. Ide*, 5 Mass. 500; *Jackson v. De Lancy*, 13 Johns. 536, 537, 7 Am. Dec. 403; *Second Reformed Presb. Church v. Disbrow*, 52 Pa. St. 219; *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. Rep. 984; *Case v. Dwire*, 60 Iowa, 442, 15 N. W. Rep. 265; *McCleary v. Ellis*, 54 Iowa, 311, 6 N. W. Rep. 571.

<sup>4</sup> *De Peyster v. Michael*, 6 N. Y. 467,

57 Am. Dec. 470, per Ruggles, C. J.; *Nichols v. Eaton*, 91 U. S. 716; *Camp v. Cleary*, 76 Va. 140; *Braman v. Stiles*, 2 Pick. 460, 13 Am. Dec. 445; *White v. White*, 30 Vt. 338; *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. Rep. 170; *Shankland's App.* 47 Pa. St. 113; *Fisher v. Taylor*, 2 Rawle, 33; *Brooke's Abridgment*, title "Condition," 57 a. "If a man have lands for a term of years on condition that he shall not grant over his estate, this is good by reason of the reversion remaining in the lessor."

Some early English cases held that alienation is a necessary incident of a life estate. *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 480. And this doctrine was adopted in some American cases. *Pace v. Pace*, 73 N. C. 119; *Tillinghast v. Bradford*, 5 R. I. 205. In the later case in England of *Wilkinson v. Wilkinson*, 3 Swans. 515, Sir Thomas Plumer, M. R., holds that a restraint on the alienation of a life estate is valid.

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deed, the intention appears otherwise.<sup>1</sup> Thus, a quitclaim deed from a husband to his wife, with condition that she should not convey the land during his lifetime without his written consent, and that in case of her death before his decease the land should revert to him, was held not to convey the land to the grantee in fee simple absolute, but that the effect of it was that the title should, in the event of the death of either of the parties, pass to the survivor.<sup>2</sup>

A conveyance to a trustee by a husband forever in fee simple for the use of his wife and her children by him, born and to be born, with a condition in the habendum that if he should survive her the whole property should revert to him free from the trust, conveyed to the trustee a fee defeasible upon the contingency specified; and on the happening of that contingency the title reverted in the husband, and thenceforth the property was his absolutely.<sup>3</sup>

**666.** The grantor may, by a condition, reserve the power to revoke a voluntary conveyance during his lifetime. Such a condition is not open to the objection that it is contrary to public policy, on the ground that it enables the parties to the deed to defeat the rights of the grantee's creditors, for the deed is notice to the creditors of the power reserved.<sup>4</sup>

**667.** But a partial restraint upon alienation, if the restraint be not unreasonable, is valid.<sup>5</sup> "If the condition be such," says Littleton,<sup>6</sup> "that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such

<sup>1</sup> *Williams v. Bentley*, 27 Pa. St. 294; *Ogden v. Brown*, 33 Pa. St. 247.

<sup>2</sup> *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. Rep. 984. *Champlin, J.*, said: "It is evident that, by executing the deed to his wife, the grantor did not intend to part with the title to his real estate unless the contingency should occur of his dying before his wife died. . . . The condition in the deed . . . is a clear indication that the title should not pass, because, if it was the intention that it should pass and the estate vest in his wife, the condition would be nugatory, and no force or effect be given to this part of the instrument."

<sup>3</sup> *Woods v. Woods*, 87 Ga. 562, 13 S. E. Rep. 692.

<sup>4</sup> *Ricketts v. Louisville, &c. Ry. Co.* (Ky.) 15 S. W. Rep. 182. Per *Holt, C. J.*: "Such a condition has always been known to the law of conveyancing. Coke says that grants may be revoked by virtue of a power expressly reserved in the deed." *Butler's Case*, 3 Coke, 25.

<sup>5</sup> *Large's Case*, 2 Leon. 82; *Langdon v. Ingram*, 28 Ind. 360; *Stewart v. Barrow*, 7 Bush, 368; *Hill v. Hill*, 4 Barb. 419, where the condition was not to alienate for fifteen years, except to certain persons. *Cornelius v. Ivins*, 26 N. J. L. 376.

<sup>6</sup> § 361; *Co. Litt.* § 223 a. And see *Langdon v. Ingram*, 28 Ind. 360.

a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good."

A condition that the grantee or devisee shall not sell the land until he arrives at a certain age, as twenty-five years or thirty-five years, is valid, the restriction not being unreasonable.<sup>1</sup> A condition not to alien within a limited time, or during the lifetime of the grantor, is valid.<sup>2</sup>

In a conveyance to several members of an association as tenants in common in undivided shares, a condition that the grantees will hold without partition or division is valid. It is not in restraint of alienation because each tenant may convey his share at his pleasure.<sup>3</sup>

**668. A condition not to sell "out of the family" is valid.** The condition does not take away all power of alienation, but only imposes a limited restraint on alienation. The distinguished Master of the Rolls, Jessell, delivering the opinion, said: "You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all these ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale: a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy. The will shows there were a great many members of the family when she made her will; a great many are named in it: therefore you have a class which probably was large, and was certainly not small."<sup>4</sup>

<sup>1</sup> *Stewart v. Brady*, 3 Bush, 623; *Dougal v. Fryer*, 3 Mo. 40, 22 Am. Dec. 458. See, however, to the contrary, *Twitty v. Camp*, Phil. (N. C.) Eq. 61, and *Bouldin v. Miller* (Tex.), 28 S. W. Rep. 940, where a conveyance to minors, "to be held in common and unsold" until the youngest shall become of age, is a conveyance of a fee simple without a condition, the breach of which would avoid the estate.

<sup>2</sup> *McWilliams v. Nisly*, 2 S. & R. 507, 7 Am. Dec. 654. See, however, *Taylor v. Mason*, 9 Wheat. 325, 350.

<sup>3</sup> *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451. *Contra*, *Lovett v. Gillender*, 35 N. Y. 617; *Smith v. Clark*, 10 Md. 186.

<sup>4</sup> *In re Macleay*, L. R. 20 Eq. 186. *Contra*, *McCullough v. Gilmore*, 11 Pa. St. 370.

669. A condition not to convey without first giving the grantor the privilege of repurchasing is void. So is a condition requiring the payment of money for the privilege of alienating to a stranger.<sup>1</sup>

A condition not to alien the land without first giving the grantor, his heirs or assigns, the privilege of repurchasing, was held void in North Carolina because the condition was indefinite as to time, and might be exercised whenever the property should be sold, and indefinite as to the amount to be paid upon repurchase.<sup>2</sup>

A condition or covenant that the grantor should "at any time" have the right of "preëmption" of the property conveyed "at and after the same price as the above-mentioned consideration," gives the grantor the option to purchase at that price in preference to any other person, in case the owner desired or offered to sell at the price specified.<sup>3</sup>

670. A condition that is repugnant to the grant is void.<sup>4</sup> "A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant preceding, neither in anything expressed nor in anything implied which is of its nature incident and inseparable from the thing granted."<sup>5</sup>

A condition that the land conveyed, or so much of it as the grantee has not sold and conveyed, shall upon his decease revert

<sup>1</sup> Shep. Touch. 130; *King v. Burchell*, Amb. 379; *Bassett v. Budlong*, 77 Mich. 338, 347, 43 N. W. Rep. 984; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Livingston v. Stickles*, 7 Hill, 253. The case of *Jackson v. Schutz*, 18 Johns. 174, 9 Am. Dec. 195, which is sometimes cited in favor of the validity of a condition giving the grantor the option of repurchasing, was upon this point the decision of a single judge, the other judges basing their decision upon another ground.

<sup>2</sup> *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. Rep. 890.

<sup>3</sup> *Garcia v. Callender*, 125 N. Y. 307, 311, 26 N. E. Rep. 283. *O'Brien, J.*, said: "The right of a person to purchase some part of the public lands at a specified

price when opened for sale, in preference to any one else, is called the right of preëmption in the practice of the government and in the decisions of the United States courts. The term is used here to express the idea that some one has the first right to purchase when the land is offered for sale, or the option of buying first."

<sup>4</sup> *Bradley v. Peixoto*, 3 Ves. Jr. 324; *Brandon v. Robinson*, 18 Ves. 429, 433, per Lord Ch. Eldon; *Gadberry v. Shepard*, 27 Miss. 203; *Littlefield v. Mott*, 14 R. I. 288; *Pynchon v. Stearns*, 11 Met. 312, 45 Am. Dec. 210; *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. Rep. 984, 18 Am. St. Rep. 404. *Georgia*: Code 1882, § 2296; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682.

<sup>5</sup> *Srukeley v. Butler*, Hob. 168.

to the grantor, is repugnant to the grant, which was in fee simple, and is therefore void.<sup>1</sup>

But in a conveyance in fee by a husband to a trustee for the use of his wife and children, a condition that if he should survive his wife the whole property should revert to him free from the trust is valid, and may be enforced.<sup>2</sup>

A condition that the conveyance shall be void upon the failure of the grantee to pay the purchase-money is not void as being repugnant to the grant.<sup>3</sup>

671. A condition that intoxicating liquors shall not be manufactured or sold upon the granted lands is valid, for it is not subversive of the estate conveyed.<sup>4</sup> It leaves the estate alienable and inheritable, and free to be subjected to other uses. Such a condition may be enforced by forfeiture if advantage be promptly taken of any breach of it.

Such a condition is not void as being in restraint of trade, so far as the grantor has in his own business an interest in enforcing it.<sup>5</sup> Nor is the condition opposed to public policy as tending to establish a monopoly in the business of selling intoxicating liquors. "It is not the policy of the State that every one should sell intoxicating drinks who pleases. On the contrary, heavy taxes are levied and onerous conditions imposed by the State for the express purpose of limiting the number of those who shall sell, and the condition in question is directly in the line of that policy, instead of being opposed to it."<sup>6</sup>

672. This is certainly the rule if the grantor has any special and substantial interest in the enforcement of the condition. Upon this point of the grantor's interest the Su-

<sup>1</sup> *Ide v. Ide*, 5 Mass. 500; *Case v. De-wire*, 60 Iowa, 442, 15 N. W. Rep. 265; *Second Reformed Presb. Church v. Dis-brow*, 52 Pa. St. 219.

<sup>2</sup> *Woods v. Woods*, 87 Ga. 562, 13 S. E. Rep. 692.

<sup>3</sup> *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682.

<sup>4</sup> *Cowell v. Springs Co.* 100 U. S. 55; *Collins Manuf. Co. v. Marcy*, 25 Conn. 242; *Plumb v. Tubbs*, 41 N. Y. 442; *At-lantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Lehigh Coal & N. Co. v. Early*, 34 W. N. C. 501, 29 Atl. Rep.

736; *Jenks v. Pawlowski*, 98 Mich. 110, 56 N. W. Rep. 1105; *Watrous v. Allen*, 57 Mich. 362, 24 N. W. Rep. 104, 58 Am. Rep. 363; *Smith v. Barrie*, 56 Mich. 314, 22 N. W. Rep. 816, 56 Am. Dec. 391; *O'Brien v. Wetherell*, 14 Kans. 616; *Jeffery v. Graham*, 61 Tex. 481; *Odessa Im-provement Co. v. Dawson*, 5 Tex. Civ. App. 487, 24 S. W. Rep. 576.

<sup>5</sup> *Watrous v. Allen*, 57 Mich. 362, 24 N. W. Rep. 104, 58 Am. Rep. 363.

<sup>6</sup> *Watrous v. Allen*, 57 Mich. 362, 24 N. W. Rep. 104, 58 Am. Rep. 363, per Cooley, C. J.

preme Court of Minnesota say: "Whether such a condition would be deemed void, upon grounds of public policy, if it should appear that the grantor had no such interest, we do not decide. Upon the face of the deed nothing appears which could render void the express condition upon which the conveyance is made and accepted. A grantor may, at least under some circumstances, effectually impose such a condition upon a conveyance of the estate; and it is not necessary, in order to make *prima facie* valid the condition expressed in the deed, that the deed shall set forth or recite the peculiar facts which may legally justify the grantor in annexing the condition to the grant. On its face the condition is effectual. It attends and qualifies the grant. The estate is conveyed and accepted in terms subject to it. If this condition is to be avoided, because in the particular case the circumstances of the grantor were not such as to authorize him to thus restrict or qualify the conveyance of his estate, it can be only upon affirmative proof of the fact relied upon for that purpose. If not thus avoided, the deed must have effect according to its terms, to which the parties have assented."<sup>1</sup>

In Michigan and Minnesota there is a statutory provision that conditions annexed to a conveyance of land which are merely nominal may be disregarded. But it is held that a condition that intoxicating liquors shall not be sold as a beverage upon the land conveyed cannot be regarded as a merely nominal condition within the meaning of the statute.<sup>2</sup>

**673. A condition not to place windows in a wall adjoining lands of a neighbor is valid.** "It is not necessary, in order to make a condition valid, that the party creating it should have any beneficial interest in any other estate which may be usefully affected by the condition. He may have conveyed an adjoining estate for the benefit of which this condition was created. He may have received a greater price for that estate on account of this condition, and justice to others may require that he should exact its performance. . . . It seems to us that there are many things which may be provided for as conditions in a deed, which, though of small consideration in the view of a stranger, may be thought of great importance by the grantor. A man has a

<sup>1</sup> *Sioux City & St. Paul R. Co. v. Singer*, 49 Minn. 301, 305, 51 N. W. Rep. 905.

<sup>2</sup> *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 51 N. W. Rep. 905, 32 Am. St. Rep. 554.

vacant lot in front of his dwelling-house which somebody is desirous to buy, and he is willing to sell, if thereby his light and air shall not be too much obstructed. May he not sell it under a condition that no building shall be erected beyond a certain height, or within a certain distance from his house, or that the land shall not be used for the purpose of a tavern, or for any particular business which is likely to be noisy or troublesome, at least for a limited number of years? Who is prejudiced by such a condition? The purchaser and all who may claim under him have notice of the restriction, and, if it diminishes the value of the land, they get their compensation in the price."<sup>1</sup>

**674. Conditions subsequent impossible of performance are void.**<sup>2</sup> "If," says Blackstone, "they be impossible at the time of their creation, or afterwards become impossible by the act of God, or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, they are void." The estate in such case becomes absolute in the grantee immediately upon the execution of the deed. "For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant."<sup>3</sup>

**675. A forfeiture is excused when the breach of condition was occasioned by the act of the law.** In a leading English case land was demised to trustees for the benefit of the poor of a parish, the trustees covenanting to build a workhouse thereon, and to use, occupy, possess, and enjoy the premises for the sole use,

<sup>1</sup> *Gray v. Blanchard*, 8 Pick. 284, 290, per Parker, C. J.

<sup>2</sup> *Shep. Touch.* 132; *Doe v. Rugeley*, 6 Q. B. 107, 114; *Davis v. Gray*, 16 Wall. 203; *United States v. Arredondo*, 6 Pet. 691, 745; *Hughes v. Edwards*, 9 Wheat. 489; *Finlay v. King*, 3 Pet. 346, 374; *Rogers v. Sebastian Co.* 21 Ark. 440; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Jones v. Walker*, 13 B. Mon. 163, 56 Am. Dec. 557; *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281; *Morse v. Hayden*, 32 Me. 227; *Parker v. Parker*, 123 Mass. 584; *Merrill v. Emery*, 10 Pick. 507; *Weathersby v. Weathersby*, 13 Sm. & M. 685; *Barksdale v. Elam*, 30 Miss. 694; *Martin v. Ballou*, 13 Barb. 119; *Whitney v. Spencer*, 4 Cow. 39;

*People v. Manning*, 8 Cow. 297; *Lamb v. Miller*, 18 Pa. St. 448; *Culin's App.* 20 Pa. St. 243; *Wheeler v. Moody*, 9 Tex. 372; *Blanchard v. Morey*, 56 Vt. 170; *Jones v. Chesapeake, &c. R. Co.* 14 W. Va. 514; *Burnham v. Burnham*, 79 Wis. 557, 567, 48 N. W. Rep. 661. **California:** Civ. Code, § 1441. **Louisiana:** Physical and moral impossibilities only are intended by the preceding articles. If the condition be only relatively impossible, that is to say, impracticable by the obligor, only from the want of skill, strength, or means, but practicable by another, it is not an impossible condition. R. Civ. Code 1889, § 2033.

<sup>3</sup> 2 Bl. Comm. 156; *Parker v. Parker*, 123 Mass. 584.



maintenance, and support of the poor of Rugeley, and not to convert the building or the land, or employ the profits thereof, to any other use, intent, or purpose whatever. There was a proviso for reëntry on breach of the covenant. The house was built, and the land was used for many years as required by the deed. Afterwards an act of Parliament was passed, and the parish incorporated with others, and a union poor-house provided, to which the act required all paupers should be removed. The heirs of the grantor brought suit in ejectment, claiming the right of reëntry for breach of the condition. The court held that, "even if the condition was not performed, it appears to us that the non-performance would in this case be excused, as being by act of law, and involuntary on the part of the lessees."<sup>1</sup>

And so, where land had been conveyed for use as a burial ground, with apt words creating a condition subsequent that the property should revert to the grantor if the grantee failed to use it for that purpose, and the land was used for such purpose until it became a public nuisance, and the State, by legislative act, forbade further interment therein, the condition of the deed was held to be destroyed, and the title vested absolutely in the grantee. The court said: "It is clear that the performance of the condition of the deed has been prevented by act of law."<sup>2</sup>

A condition that the granted land shall be used for a place of burial, and for no other purpose, is destroyed when the State, in the proper and reasonable exercise of its police power, prohibits further interments in the land, and the title thereupon vests absolutely in the grantee.<sup>3</sup>

<sup>1</sup> Doe dem. Marquis of Anglesea v. Rugeley, 6 Q. B. 107. The court cited Bac. Abr. tit. "Condition;" Com. Dig. tit. "Condition;" and the case of Brewster v. Kitchell, 1 Salk. 198, 1 Ld. Raym. 317. See Doe dem. Lord Grantley v. Butcher, 6 Q. B. 115, to the same effect. The above case is stated, in the language of Mr. Justice Lurton, in Board of Com'rs v. Young, 59 Fed. Rep. 96, which case supports the same principle. See, also, Mitchel v. Reynolds, 1 P. Wms. 181.

<sup>2</sup> Scovill v. McMahon, 62 Conn. 378, 26 Atl. Rep. 479; Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; Dunham v.

New Britain, 55 Conn. 378, 11 Atl. Rep. 354; State v. Wordin, 56 Conn. 216, 14 Atl. Rep. 801; Woodruff v. Railroad Co. 59 Conn. 63, 20 Atl. Rep. 17.

<sup>3</sup> Scovill v. McMahon, 62 Conn. 378, 390, 26 Atl. Rep. 479. Hall, J., said: "If it should be said that the plaintiffs' interests in this property had been taken from them by the State or by the city of Waterbury by right of eminent domain, we should reach the same conclusion upon the question of whether the condition of the deed had been broken. If the city of Waterbury, by taking this land for a public park, under the valid act of the

Where a city or town holds land under a grant for a burying-ground, and to be appropriated for no other use or purpose whatsoever, the title reverts to the grantors when the land can no longer be used for such purpose by reason of an ordinance of the municipality and an act of the legislature prohibiting the use of such land for burial purposes.<sup>1</sup>

But the performance of such a condition is not excused or dispensed with for the reason that the person who is bound for its performance is under a disability, such as infancy or marriage.<sup>2</sup>

**676.** If a condition precedent becomes impossible the grant fails, because no estate vests in the grantee until the condition is performed.<sup>3</sup> In a sale and conveyance by a railroad company of its right of way, roadbed, and property in general to another railroad company, conditions that the deed should not become operative until the purchasing corporation should, among other things, complete the road within a given time and issue paid-up stock to the selling company, are conditions precedent, and, if the conditions are not complied with, upon the bankruptcy of the purchasing company, the conditions become impossible of performance, and the title remains, and must remain, in the selling company.<sup>4</sup>

**677.** If the performance of the condition, whether precedent or subsequent, is rendered impossible by the grantor's own act, he cannot complain of a breach of it, and regain the

legislature, has prevented its use as a burial place, it is clear that the performance of the condition of the deed has been prevented by act of law; and we know of no principle or authority by which the taking of the property under the right of eminent domain would work a forfeiture which would require payment both to the plaintiffs of the value of the land and to the defendant of the value of the estate forfeited." See, also, *Portland v. Terwilliger*, 16 Oreg. 465, 19 Pac. Rep. 90.

<sup>1</sup> *Mayor v. Watson* (N. J.), 29 Atl. Rep. 487. So, also, in *Young v. Board*, 51 Fed. Rep. 585, the lands were donated by the owner of the fee to a municipal body for a burying-ground, and that body afterwards

passed an ordinance prohibiting the further use of it for such purposes. The ordinance was declared to be a valid exercise of the police power, and also to operate as a complete abandonment of the dedicated use, by which the lands reverted to the original owner.

<sup>2</sup> *Barker v. Cobb*, 36 N. H. 344; *Garrett v. Scouten*, 3 Denio, 334.

<sup>3</sup> *Stockton v. Weber*, 98 Cal. 433, 33 Pac. Rep. 332, 335; *Martin v. Ballou*, 13 Barb. 119; *Blean v. Messenger*, 33 N. J. L. 499; *Jones v. Bramblet*, 2 Ill. 276.

<sup>4</sup> *Tennessee &c. R. Co. v. East Ala. Ry. Co.* 73 Ala. 426.

estate by a reëntry.<sup>1</sup> The condition is no longer binding, and the estate is discharged therefrom.

A grantor who enters before a breach of the condition, *prima facie* prevents a performance of the condition.<sup>2</sup>

A condition is void if it is stated so indefinitely that it is impossible to determine with certainty the event upon which the estate is to arise or be defeated.<sup>3</sup>

#### VI. *Performance and Forfeiture.*

**678.** A condition, when relied upon to work a forfeiture, is construed with great strictness.<sup>4</sup> The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the

<sup>1</sup> *United States v. Arredondo*, 6 Pet. 691, 745; *Gray v. Blanchard*, 8 Pick. 284; *Elkhart Car Co. v. Ellis*, 113 Ind. 215, 15 N. E. Rep. 249; *Leonard v. Smith*, 80 Iowa, 194, 45 N. W. Rep. 762; *Jones v. Bramblet*, 2 Ill. 276; *Houghton v. Steele*, 58 Cal. 421; *Jones v. Walker*, 13 B. Mon. 163, 56 Am. Dec. 557; *Young v. Hunter*, 6 N. Y. 203; *Whitney v. Spencer*, 4 Cow. 39; *Jones v. Chesapeake & O. R. Co.* 14 W. Va. 514; *Mizell v. Burnett*, 4 Jones L. 249, 69 Am. Dec. 744. **Louisiana**: The condition is considered as fulfilled when the fulfilment of it has been prevented by the party bound to perform it. R. Civ. Code 1889, § 2040.

<sup>2</sup> *Elkhart Car Works Co. v. Ellis*, 113 Ind. 215, 15 N. E. Rep. 249.

<sup>3</sup> *Shep. Touch*. 128; *Doe v. Carew*, 2 Q. B. 317; *Fillingham v. Bromley*, Turn. & Russ. 530.

<sup>4</sup> *Radford v. Willis*, L. R. 7 Ch. 7. **California**: Civ. Code, § 1442; *Los Angeles Cen. Asso. v. Los Angeles*, 95 Cal. 420, 30 Pac. Rep. 523. **Florida**: *Jenkins v. Merritt*, 17 Fla. 304. **Georgia**: *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682. **Illinois**: *Voris v. Renshaw*, 49 Ill. 425; *Wilson v. Galt*, 18 Ill. 431. **Indiana**: *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Hunt v. Beeson*, 18 Ind. 380. **Maine**: *Hooper v. Cummings*, 45 Me. 359; *Laberee v. Carleton*, 53 Me. 211; *Osgood v. Abbott*, 58 Me. 73. **Mary-**

**land**: *Glenn v. Davis*, 35 Md. 208, 6 Am. Rep. 389. **Massachusetts**: *Crane v. Hyde Park*, 135 Mass. 147, 149; *Bradstreet v. Clark*, 21 Pick. 389; *Hadley v. Hadley Manuf. Co.* 4 Gray, 140; *Merrifield v. Cobleigh*, 4 Cush. 178. **Michigan**: *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168; *Waldron v. Toledo, &c. Ry. Co.* 55 Mich. 420, 21 N. W. Rep. 870. **Mississippi**: *Gadberry v. Sheppard*, 27 Miss. 203. **New Hampshire**: *Page v. Palmer*, 48 N. H. 385; *Emerson v. Simpson*, 43 N. H. 475, 82 Am. Dec. 68; *Hoyt v. Kimball*, 49 N. H. 322; *Chapin v. School Dist.* 35 N. H. 445. **New Jersey**: *McKelway v. Seymour*, 29 N. J. L. 321; *Southard v. Cent. R. Co.* 26 N. J. L. 13. **New York**: *Lynde v. Hough*, 27 Barb. 415; *Ludlow v. New York, &c. R. Co.* 12 Barb. 440; *Williams v. Dakin*, 22 Wend. 201; *Woodworth v. Payne*, 74 N. Y. 196, 30 Am. Rep. 298; *Craig v. Wells*, 11 N. Y. 315; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. Rep. 335, 133 N. Y. 315, 31 N. E. Rep. 236, 118 N. Y. 502, 23 N. E. Rep. 904. **North Dakota and South Dakota**: *Dak. Comp. Laws 1887, § 3435*. **Pennsylvania**: *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Newman v. Rutter*, 8 Watts, 51; *Lehigh Coal & N. Co. v. Early*, 34 W. N. C. 501, 29 Atl. Rep. 736. **Wisconsin**: *Mills v. Evansville Seminary*, 58 Wis. 135, 15 N. W. Rep. 133.

evidence offered to show a breach will be taken most strongly against him and in favor of the grantee.

679. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture.<sup>1</sup> Thus a condition that the grantee shall not convey the property prior to a day named, which was about ten years after the date of the conveyance, except by a lease for years, was not broken by a lease for ninety-nine years, though the grantee at the same time gave the lessee a bond for a conveyance in fee, to be executed after the period of limitation. Neither the bond nor the lease was a conveyance of the property. Nor do both instruments together constitute a conveyance, and therefore they cannot be made the ground for a forfeiture.<sup>2</sup>

Under a conveyance of land to a county for "county purposes," a court-house and jail were erected upon it, but subsequently the county town was removed to another place. There was nothing in the deed requiring the county to devote the land to any special county purpose, and therefore it was held that the mere removal of the county town was no evidence of an intention to abandon the property, or to devote it to any other than county purposes.<sup>3</sup>

680. It must be shown that the spirit and purpose of the condition have been wilfully disregarded by the grantee to establish a breach of it which will authorize a reëntry by the grantor. He is required to establish something more than a technical breach through the action of a stranger without the grantee's permission. A conveyance was made to the town of Yonkers "upon the express condition that the strip of land forming part of the premises above described, and being twelve feet and six inches in width, and extending all along said Academy Street, shall forever hereafter be and remain a part of said Academy Street, and shall never be used for any other purpose whatsoever. And also that all the residue of said land hereby conveyed shall forever hereafter be and remain public and open as a public

<sup>1</sup> *Shep. Touch.* 133; *Voris v. Renshaw*, road Co. 40 *Kans.* 130, 19 *Pac. Rep.* 316; 49 *Ill.* 425; *Emerson v. Simpson*, 43 *N.* Gadberry *v. Sheppard*, 27 *Miss.* 203.

*H.* 473; *Hadley v. Hadley Manuf. Co.* 4 <sup>2</sup> *Voris v. Renshaw*, 49 *Ill.* 425.

*Gray*, 140; *Lynde v. Hough*, 27 *Barb.* <sup>3</sup> *Poittevent v. Supervisors*, 58 *Miss.* 415; *Ritchie v. Kansas, &c. Ry. Co.* 810; *Miller v. Tunica Co.* 67 *Miss.* 651, (Kans.) 39 *Pac. Rep.* 718; *Wier v. Rail-* 7 *So. Rep.* 429.

highway, and that no house, building, or other erection whatsoever, except a public monument, shall ever be built or erected or permitted upon the said land, or upon any part thereof." The owner of adjoining land erected a building which encroached upon the highway at one end sixteen inches, and at the other two inches, and he also excavated an area under the sidewalk which was covered with gratings. The grantor claimed a breach of the condition and a right of reëntry. It was held that the town had not done or knowingly permitted anything which amounted to a breach of the condition within any fair and reasonable construction of it. As to the area under the sidewalk the court said: "The purpose of the condition was to preserve the land conveyed for public purposes, and it was not violated by permitting the soil or space under the sidewalk to be used in such a manner as is usual and common in cities and villages, as such use is in no sense inconsistent with that of the public for the purpose of a sidewalk for persons passing along the street." As to the encroachment of the wall of the building upon the highway the court said: "If it be admitted that this small strip of land was included in the plaintiff's grant to the municipality for public purposes, and that it has by an honest mistake been appropriated to a private purpose in the manner disclosed by the record, the breach of the condition, if any, would be purely technical, and of such an unsubstantial character as to warrant the conclusion that it was not within the purpose or intention of the parties to the conveyance."<sup>1</sup>

**681. A substantial performance of the condition discharges it, and it is for the jury to say whether the condition has been in substance performed.**<sup>2</sup> Where the condition was for the payment of a certain annuity by the grantee to the grantor on a given day in each year during the life of the grantor, the condition was not broken so long as the annuity was not in arrears. "The annuity, although payable in money, could be discharged by payment otherwise, by mutual stipulation and consent; and if the grantor, after he had parted with the property, agreed to take, in lieu of the

<sup>1</sup> *Rose v. Hawley*, 141 N. Y. 366, 376, 378, 36 N. E. Rep. 335.      *Wilson v. Galt*, 18 Ill. 431; *Chapin v. School Dist.* 35 N. H. 445; *Sonthard v. Central R. Co.* 26 N. J. L. 13; *Plummer v. Neile*, 6 Watts & S. 91.

<sup>2</sup> *Spaulding v. Hallenbeck*, 39 Barb. 79, 85; *Avery v. New York Cent. & H. R. Co.* 121 N. Y. 31, 24 N. E. Rep. 20;

annuity stipulated in the deed, the rents and profits of the premises produced by his own management and superintendence of the property, and did in fact take charge of the property and receive the rents and profits in accordance with this agreement, this was a discharge of the annuity as to each year in which payment was received in this manner." Parol evidence of such agreement is admissible.<sup>1</sup>

A condition, in a deed to a railroad company of a right of way, that it shall erect a station for the convenient shipment of freight, the character of which is not specified, is complied with by erection of a board shed, without the placing of an agent there, it being in structure and in the mode of its management like most of the stations on the road.<sup>2</sup>

A grantor conveyed to a railroad company a strip of land between grantor's hotel and the company's depot property, which was south of the hotel. The deed contained a clause that the conveyance was "on condition that the said railroad company . . . shall at all times maintain an opening into the premises hereby conveyed, opposite the Exchange Hotel, so called, adjacent to the premises hereby conveyed, for the convenient access of passengers and their baggage to and from said premises." At the time of the conveyance, defendant's trains stopped opposite to the hotel, so that passengers would cross the strip conveyed in reaching the hotel. Afterwards defendant erected a depot on the west side of the hotel, closed up the opening in the strip, and opened a gateway on the east side of the depot, leading directly into the hotel property, but not across the strip. It was held that, as the purpose of the clause was to secure to the hotel a direct communication with the depot, this was a substantial and sufficient compliance with it.<sup>3</sup>

A condition that a manufacturing company shall "transfer" its "works" to certain land does not require that the identical buildings and machinery be removed.<sup>4</sup>

Where a life estate was reserved to the grantor, provided he should at all times keep the property insured for the benefit of

<sup>1</sup> *Denham v. Walker* (Ga.), 21 S. E. 121 N. Y. 31, 24 N. E. Rep. 20, reversing Rep. 102. 2 N. Y. Supp. 101.

<sup>2</sup> *Caldwell v. East Broad Top R. Co.* . . . <sup>4</sup> *Hanna v. South St. Jo. Land Co.* (Pa.) 32 Atl. Rep. 85. (Mo.) 28 S. W. Rep. 652.

<sup>3</sup> *Avery v. New York Cent. & H. R. Co.*

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those owning the insurable interest, and by oversight the policy was written payable to the grantor alone, the life estate was held not to be forfeited, especially as the grantee failed for ten years to call attention to the form of the policy, and did not ask to have a proper one taken out, and as it appeared that the grantor in good faith attempted to comply with the conditions of the deed.<sup>1</sup>

**682.** A condition must be performed within a reasonable time when no time is specified within which it is to be performed.<sup>2</sup> Thus a condition to pay a mortgage upon the property conveyed must be performed within a reasonable time after the mortgage becomes due; and a condition to pay marriage portions to the grantor's daughters must be performed within a reasonable time after receiving notice of their marriage.<sup>3</sup>

A condition which expressly provides for performance within a reasonable time is construed in the same manner as a condition which implies a performance within a reasonable time. Where the condition was that the grantee should within a reasonable time build a church upon the land, the court took judicial notice of the fact that an unexplained delay of twenty-nine years within which to commence to build a church is unreasonable.<sup>4</sup>

A condition to be performed at the convenience of the grantee should be performed within a reasonable time. What is a reasonable time is a question of law to be determined according to the facts and circumstances of the case.<sup>5</sup>

**683.** If land is granted upon a condition for the performance of which no time is limited, either in express terms or from the nature of the condition itself, it is a general rule that the grantee has his lifetime for performance.<sup>6</sup> But if it appears that a prompt performance was contemplated by the parties, or is necessary to give the grantor the benefits he was reasonably

<sup>1</sup> *Hurto v. Grant* (Iowa), 57 N. W. Rep. 899.

<sup>2</sup> *Shep. Touch.* 134; *Rowell v. Jewett*, 69 Me. 293, 71 Me. 408; *Fisk v. Chandler*, 30 Me. 79; *Stuyvesant v. New York*, 11 Paige, 414; *Hamilton v. Elliott*, 5 S. & R. 375; *Dickey v. McCullough*, 2 Watts & S. 88; *Hayden v. Stoughton*, 5 Pick. 528; *Allen v. Howe*, 105 Mass. 241; *Reed v. Hatch*, 55 N. H. 327.

<sup>3</sup> *Ross v. Tremain*, 2 Met. 495; *Rowell v. Jewett*, 69 Me. 293.

<sup>4</sup> *Upington v. Corrigan*, 69 Hun, 320, 23 N. Y. Supp. 451.

<sup>5</sup> *Adams v. Ore Knob Copper Co.* 4 Hughes, 589.

<sup>6</sup> *Finlay v. King*, 3 Pet. 346, per Marshall, C. J.; *Hamilton v. Elliott*, 5 Serg. & R. 375, 383.

entitled to receive from the provision, the grantee has only a reasonable time for its performance.<sup>1</sup>

684. If the time for the performance of the condition is strictly limited, forfeiture is incurred by non-performance within that time. In all cases where a time is set for the doing or performance of the matter contained in the condition, be it to pay money, make an estate, or the like, it must be done at the time agreed upon and set down in the condition. And in cases where it is to be done before a time certain, it must be done before that time, or else the condition is broken.<sup>2</sup> If the condition be that a building shall be erected on the granted land within five years, for municipal purposes, a failure to erect the building within the time named is a breach of the condition, for which a forfeiture may be enforced.<sup>3</sup>

A condition that a court-house shall be erected upon the granted land, and maintained for a certain number of years, is broken by the removal of the county seat to another village within that time. The condition was not satisfied by keeping and maintaining the building upon the premises after the county seat had been removed.<sup>4</sup>

685. A condition to save the grantor harmless from the payment of a certain debt is not broken till the grantor has been damnified by being compelled to pay it.<sup>5</sup>

686. Forfeiture is not incurred, under a condition that land shall be used for a particular purpose, by the use of it also for another purpose consistent with the purpose specified, in the absence of any positive restriction against such use. A conveyance to a county for "court-house purposes," with a condition

<sup>1</sup> *Hamilton v. Elliott*, 5 Serg. & R. 375, 383, per Gibson, J. In *Massachusetts* it is provided by statute that when the title or use of real estate is affected by conditions or restrictions unlimited as to time, such conditions or restrictions are construed as being limited to the term of thirty years from the date of the deed or other instrument, or the date of the probating of the will creating such conditions or restrictions, except only in cases of gifts or devises for public, charitable, or religious purposes. This act does not apply to existing conditions or restrictions, or to such as may be contained in a deed, gift, or

grant of the Commonwealth, nor does it operate in any case to defeat restrictions for a term of years certain. Acts 1887, ch. 418.

<sup>2</sup> *Shep. Touch.* 134.

<sup>3</sup> *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243.

<sup>4</sup> *Pepin Co. v. Prindle*, 61 Wis. 301, 21 N. W. Rep. 254.

<sup>5</sup> *Sanborn v. Woodman*, 5 Cush. 36; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; *Michigan State Bank v. Hammond*, 1 Doug. (Mich.) 527.



that the land shall revert if it shall cease to be so used, is not broken by any incidental or collateral use, to which the land may be temporarily devoted, which does not conflict with its continued use for court-house purposes, as, by failure to inclose it entirely with a fence, and allowing hitching-posts for public use to be erected on the uninclosed portion, or a temporary structure for posting bills.<sup>1</sup>

Where land is conveyed upon condition that it shall be used for a certain purpose, it is no ground of forfeiture if it is used for other purposes, provided it is also used for the purpose for which it was conveyed.<sup>2</sup>

**687. Whether a forfeiture is incurred, by the abandonment of the use specified in a condition, depends upon the terms and general purpose of the condition.** If, by a condition that certain buildings or a certain structure shall be permanently located upon the granted land, it is meant simply that this land shall in good faith be selected as the site of such buildings or structure, and that the same shall be erected upon the granted land, the condition is fulfilled by the erection of the buildings or structure upon the land, and the use of it for a time for the purpose intended, though the use of it for this purpose is subsequently abandoned.<sup>3</sup>

A condition in a conveyance to trustees that they shall build thereon a house of worship when they think fit, and permit certain persons to preach in said church, and that they should permit the building to be used "for such other purposes as should be deemed appropriate and necessary to further the cause of Christ," is fulfilled by erecting a church within a reasonable time and using the church as long as it is fit for use. The trustees might then sell the land, and invest the proceeds in a parsonage for the same congregation in connection with a new church on a different lot, there being nothing in the deed in the nature of a covenant to rebuild, or words indicating a desire on the part of

<sup>1</sup> *Henry v. Etowah Co.* 77 Ala. 538; *Poitevent v. Hancock Co.* 58 Miss. 810. *ner v. Darnell*, 128 Ind. 38, 27 N. E. Rep. 162; *Jeffersonville, &c. R. Co. v. Barbour*,

<sup>2</sup> *McKelway v. Seymour*, 29 N. J. L. 321; *Hadley v. Hadley Manuf. Co.* 4 Gray, 140; *Broadway v. State*, 8 Blackf. 290; *McKissick v. Pickle*, 16 Pa. St. 140. 89 Ind. 375; *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. Rep. 442; *Poitevent v. Hancock Co.* 58 Miss. 810; *Miller v. Tunica Co.* 67 Miss. 651, 7 So. Rep. 429;

<sup>3</sup> *Mead v. Ballard*, 7 Wall. 290; *Berkley v. Union Pac. Ry. Co.* 33 Fed. Rep. 794; *Hunt v. Beeson*, 18 Ind. 380; *Sum- Union Canal Co. v. Young*, 1 Whart. 410, 30 Am. Dec. 212; *Cushman v. Church*, 14 Pa. Co. Ct. 26.

the grantor that the land should revert upon a failure of the trustees to maintain the church.<sup>1</sup>

Where land with buildings was conveyed for a nominal sum, in consideration that the grantee, his heirs and assigns, would for twenty years use the same exclusively for hotel purposes, and it was provided that the destruction of the buildings by fire should not in any wise affect or weaken the force of the condition, it was held that, upon the destruction of the buildings by fire within that time, the grantee was bound to rebuild, and that, the grantee having shown no intention to rebuild for a year afterwards, the grantor was entitled to enter for a breach of condition.<sup>2</sup>

688. Under a condition in a deed of a meeting-house lot that it should revert unless it should be improved for that purpose, no forfeiture is incurred by allowing the house to get out of repair, and by omitting to hold religious services in it for several years, if such services were afterwards resumed.<sup>3</sup>

A deed of land to a church for church purposes contained a condition that if the seats of the church erected on the premises shall be "rented or sold," the land should revert to the grantor. It was held that a sale of the church to an individual under an order of court, for the purpose of paying the debts of the church society, by a deed containing the same condition, was not a breach of the condition. A conveyance of the property was not a renting or sale of the pews within the meaning of the condition, as an interest in a pew was separate from the fee of the land.<sup>4</sup>

A deed by way of gift was made to the trustees of a church of a lot of land adjoining the church building, "to be used as a parsonage lot or church purpose and no other, and when not so used to revert back" to the donor. No parsonage was built. The lot remained uninclosed, but was used by persons attending the church services to hitch their horses upon. This was held to be a church purpose, and any church purpose will meet the requirement of the grant.<sup>5</sup> And so a conveyance of land to a religious society, "to hold so long as needed for meeting purposes,"

<sup>1</sup> *Hardy v. Wiley*, 87 Va. 125, 12 S. E. Rep. 233.

<sup>2</sup> *Allen v. Howe*, 105 Mass. 241. And see *Reed v. Hatch*, 55 N. H. 327.

<sup>3</sup> *Osgood v. Abbott*, 58 Me. 73.

<sup>4</sup> *Woodworth v. Payne*, 74 N. Y. 196, 30 Am. Rep. 298.

<sup>5</sup> *Bailey v. Wells*, 82 Iowa, 131, 47 N. W. Rep. 988.

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and then to revert, is not broken by the removal of the church building from the granted land to an adjacent lot, if the land is still used and needed for any purpose connected with the meetings of the society.<sup>1</sup>

But where a grant of land was made on condition that it should be held for the support of any minister who might be settled by a certain religious society to preach in a meeting-house standing or to be built on the granted land, and the society afterwards took down the meeting-house and erected a new one on a different site, it was held that after the lot had remained vacant for three and a half years there was a breach of the condition, and that the breach of the condition was not saved by a vote of the society that the meeting-house lot should be reserved for the erection of a meeting-house at some future period when they might deem it expedient.<sup>2</sup>

A condition that a church building shall be erected upon the land, and thereafter used as a place of worship, is broken by a sale of the property and its conversion to business purposes.<sup>3</sup>

689. There is no implication, in a deed of land to a church society of a particular denomination for church purposes, that the use of the land is limited to that particular denomination.<sup>4</sup>

But a deed of land to an individual in trust for the use of the members of the Methodist Episcopal Church in a certain town, on condition that in no case is the general conference of that church to have any right in the premises, or take any control or direction of the same, creates a condition which is violated by a union of this church with an annual conference subordinate to the general conference.<sup>5</sup>

690. A condition, that a railroad company shall construct its road or use the granted land for certain purposes within a limited time, will not be enforced by forfeiture unless there is a clear and absolute breach of the condition. If the condition is indefinite in regard to the use of the land, the court will regard the use and occupation of the land by the railroad company for some of the purposes demanded by the terms of the deed, though slight,

<sup>1</sup> *Carter v. Branson*, 79 Ind. 14.

<sup>2</sup> *Austin v. Cambridgeport Parish*, 21 Pick. 215.

<sup>3</sup> *Scott v. Stipe*, 12 Ind. 74.

<sup>4</sup> *Woodworth v. Payne*, 74 N. Y. 196, 30 Am. Rep. 298.

<sup>5</sup> *Guild v. Richards*, 16 Gray, 309. And see *Congregational Society v. Stark*, 34 Vt. 243.

as a compliance with the condition.<sup>1</sup> And so, where land was conveyed to a railroad company "for the erection and maintenance thereon of freight-houses, . . . side-tracks, turnouts, switches, and buildings, and for such other general railroad purposes as may be necessary and expedient," and it appears that a freight-house was built, which was afterwards sold to the grantor, and the land has been continually used for railroad purposes, there was no breach of the condition.<sup>2</sup>

Where a conveyance to a railroad company of a right of way through the grantor's land was made in consideration that the company should construct its road upon such land, and on condition that if it did not so construct its road the conveyance should be void, though it did not construct the road through this land for more than thirteen years, but during this time it was constructing its road over other parts of its chartered route, it was held that the grantor could not declare a forfeiture after the road was completed.<sup>3</sup>

A conveyance was made to a railroad corporation of land "to be used by it for railroad purposes," upon condition that, "if work is not commenced on said road in two years, then said property is to revert to" the grantor. The name of the grantee was at the time of the delivery of the deed borne by a railway company formed by the consolidation of three different companies, and also that previously borne by one of the companies entering into such consolidation. The line of the consolidated company extended from a point in North Carolina to Atlanta in the State of Georgia. It was held that the construction and operating of a portion of its line of railway in the State of North Carolina, within the time specified in the deed, was sufficient to prevent a reversion to the grantor.<sup>4</sup>

691. A condition in a conveyance to a railroad company that the company shall continue to maintain and operate their railroad, and that the grant shall "cease with the non-use of the same for such purpose," is not a condition that the road shall be built over the entire charter route of the company. No such

<sup>1</sup> *Chute v. Washburn*, 44 Minn. 312, 46 (Ala.) 13 So. Rep. 311. See, also, *Knight v. Alabama Mid. Ry. Co.* (Ala.) 13 So. N. W. Rep. 555.

<sup>2</sup> *Noyes v. St. Louis, &c. R. Co.* (Ill.) Rep. 260.

21 N. E. Rep. 487.

<sup>4</sup> *Lester v. Georgia, &c. Ry. Co.* 90 Ga.

<sup>3</sup> *Yancey v. Savannah & W. R. Co.* 802, 17 S. E. Rep. 113.

condition is expressed or implied, but only that the property conveyed shall be used for the construction and operation of the railroad thereon.<sup>1</sup>

A condition in a conveyance to a railroad company that the land should be used only for a passenger and freight depot is not violated by the company's extending its road beyond the point of its terminus, which, when the deed was given, was upon the granted land, and thereby making it a place of transit and not merely a depot. There was no such restriction within the terms of the deed or in the contemplation of the parties.<sup>2</sup>

But a condition in a deed to a railroad company that the company will erect a station on the land conveyed, and forever maintain it as a regular stopping-place for two trains daily in each direction, is not complied with by erecting a station upon other land, distant about a thousand feet from such land, at which many more trains stop.<sup>3</sup>

Where a conveyance was made to a railroad company in consideration that the land should be used for a depot and other railroad purposes, with a condition that if the company should discontinue to use the same for a depot the grantor might resume possession, it was held that the railroad company could not remove its depot and retain possession of the land for other railroad purposes.<sup>4</sup>

692. A condition that the land shall be devoted to the purposes of an academy or public school, and that it shall revert when it ceases for two years together to be used for such purposes, does not mean that there shall be a forfeiture when two years have passed without a school, no other use being made of the property. There having been no abandonment of the property for the use prescribed, the mere non-use of it for such time would not defeat the grant.<sup>5</sup> And so, where a conveyance of land was made "for the purpose of building a schoolhouse thereon, and to be improved for the benefit of schools, and for no other purpose," with a provision that, if the grantee shall cease for two years in

<sup>1</sup> *Morrill v. Wabash, St. L. & P. Ry.* 381. And see *Louisville, &c. R. Co. v. Co.* 96 Mo. 174, 9 S. W. Rep. 657. And *see St. Louis v. Wiggins Ferry Co.* 15 Mo. App. 227.

<sup>2</sup> *Southard v. Cent. R. Co.* 26 N. J. L. 13.

<sup>3</sup> *Howell v. Long Island R. Co.* 37 Hun,

381. And see *Covington, 2 Bush*, 526.

<sup>4</sup> *Owensboro & N. Ry. Co. v. Griffeth (Ky.)*, 17 S. W. Rep. 277.

<sup>5</sup> *Gage v. School Dist.* 64 N. H. 232, 9 Atl. Rep. 387. And see *Rowe v. Minneapolis*, 49 Minn. 148, 51 N. W. Rep. 907.

succession to improve the land for such purpose, the estate shall be forfeited, and it appeared that a schoolhouse was built on the land and maintained for many years, when the school was discontinued, and no school had been kept there for nearly ten years, when the grantor's heirs brought their writ of entry, but the town had not abandoned the property or used it for any other purpose, it was held that there had been no forfeiture of the estate.<sup>1</sup> And so where the condition was that the land should be used as a site for a seminary, and it was so used for several years, and then for several years was not so used, and during this time the acts and declarations of the trustees managing the seminary evinced an intention to abandon the property for seminary purposes, but the school was again reopened, it was held that there had been no breach of the condition which worked a forfeiture. In neither of these cases was there a complete abandonment of the property by the grantee.<sup>2</sup>

A condition that the premises shall be used only for school purposes is not broken by an occasional use of the building for religious or temperance meetings.<sup>3</sup>

693. A condition that is personal to the grantee, as where it is in terms confined to him without mentioning his heirs or assigns, must be performed in his lifetime. Upon his death the condition is discharged, and the estate becomes absolute in his heirs or devisees.<sup>4</sup> A provision that the grantee is to do the thing, which is the subject of the condition, "forever," does not necessarily make the performance of it binding upon his heirs.<sup>5</sup> On the other hand, a condition is not personal merely because the grantee bears a personal relation to the grantor, as where the condition is for the support of a parent or other near relative, for such a condition may be performed by another, unless the personal service of the grantee is expressly stipulated for.<sup>6</sup> A condition for the support of the grantor has, however, sometimes been considered a personal condition.<sup>7</sup>

<sup>1</sup> *Crane v. Hyde Park*, 135 Mass. 147.

<sup>2</sup> *Mills v. Evansville Seminary*, 58 Wis. 135, 15 N. W. Rep. 133. See, also, *Rowe v. Minneapolis*, 49 Minn. 148, 51 N. W. Rep. 907.

<sup>3</sup> *Broadway v. State*, 8 Blackf. 290.

<sup>4</sup> *Emerson v. Simpson*, 43 N. H. 475, 82 Am. Dec. 168; *Page v. Palmer*, 48 N. H. 385.

<sup>5</sup> *Emerson v. Simpson*, 43 N. H. 475, 82 Am. Dec. 168.

<sup>6</sup> *Wilson v. Wilson*, 38 Me. 18, 61 Am. Dec. 227; *Joselyn v. Parlin*, 54 Vt. 670; *Henry v. Tupper*, 29 Vt. 358.

<sup>7</sup> *Barker v. Cobb*, 36 N. H. 344; *Rollins v. Riley*, 44 N. H. 9.

In a deed of a right of way to a railroad company, a condition that the grantor and his family shall have free passage over the road "so long as the land and appurtenances hereinbefore described shall be used as a railroad, or for railroad purposes, under the charter of said corporation," was but a limitation of the grant, and did not perpetuate the right to the descendants of the grantor. By the charter of the company the State reserved the right at any time within twenty years to purchase its property and franchises. "The words 'under the charter of the corporation' were therefore necessary to limit the agreement to carry to the time the corporation might have the power to use the land for railroad purposes. So, too, the words 'used for railroad purposes' were a necessary and proper limitation of the contract to carry. If the location of the road were changed, and the land conveyed by the grantor should revert to him, the parties would naturally provide that the contract to carry should be at an end. Other contingencies might also happen. The charter of the corporation could be repealed at the pleasure of the legislature; its franchise might be forfeited for misuser or non-user, or it might be surrendered. All these considerations show that the words in question were words of limitation, and did not extend the word 'family' so as to include the descendants of the grantor to the remotest generation."<sup>1</sup>

694. But where the condition applies to the property itself, and not in terms to the grantee, the condition is not personal, though it does not include the heirs and assigns of the grantee. Thus in a grant of land a condition inserted, that the property shall not be used for the sale of intoxicating liquors, may be enforced by forfeiture for a breach of the condition against a subsequent purchaser of the land, although the condition does not in terms include the heirs and assigns of the grantee. The condition applies to the use of the property. It runs with the land.<sup>2</sup> And so where the condition was that the land should be used for the purpose of a street only, the condition was held to apply to the purchaser from the grantee.<sup>3</sup>

<sup>1</sup> *Dodge v. Boston & P. R. Co.* 154 Mass. 299, 28 N. E. Rep. 243, per Lathrop, J. *v. Wetherell*, 14 Kans. 616. And see *Hayes v. Waverly & P. R. Co.* 51 N. J. Eq. 345, 27 Atl. Rep. 648; *Verplanck v. Wright*, 23 Wend. 506.

<sup>2</sup> *Odessa Imp. Co. v. Dawson*, 5 Tex. Civ. App. 487, 24 S. W. Rep. 576; *O'Brien*

<sup>3</sup> *Carpenter v. Graber*, 66 Tex. 465, 1

And so where the condition was to build a church within a reasonable time, it was held that the condition was annexed to the estate, and would follow it after the death of the grantee, into the hands of any person to whom it might come.<sup>1</sup> A condition to "erect upon the said premises a cotton factory within two years" is a condition annexed to the estate conveyed, and not a personal covenant of the grantee.<sup>2</sup>

When the condition applies to the property, and is not personal to the grantee, it may be performed by a subsequent purchaser from the grantee, or by any one interested in the land or in the performance of the condition.<sup>3</sup>

**695. An easement in fee must strictly be appurtenant to land, and therefore an easement in gross is not strictly an easement in fee. But an easement in gross granted to a city, "its successors and assigns," is capable of assignment, and is in perpetuity, though not technically in fee.<sup>4</sup>**

#### VII. *Waiver of Conditions.*

**696. A condition is released by a conveyance by the grantor of all his interest in the property to the person holding the title.<sup>5</sup> His conveyance of such interest to a stranger also operates to discharge the condition, for such conveyance deprives him of the right to enter for a breach, and it does not pass such right to the stranger, it being merely a right of action which is not assignable.<sup>6</sup> Though such conveyance be to a son of the grantor, who upon his father's death becomes his heir, and in the absence of the conveyance would have a right of entry, the**

S. W. Rep. 178. See, also, *Pugh v. Mays*, 60 Tex. 191; *Berryman v. Schumaker*, 67 Tex. 312, 3 S. W. Rep. 46; *Collins Manuf. Co. v. Marcy*, 25 Conn. 239, where the condition was enforced against a lessee of the grantee, although the point was not directly raised in the case. See *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. Rep. 562, as to liability of the purchaser of a railroad under a condition in a deed to the original company to furnish the grantor a free passage over the railroad at all times.

<sup>1</sup> *Upington v. Corrigan*, 69 Hun, 320, 23 N. Y. Supp. 451.

<sup>2</sup> *Langley v. Chapin*, 134 Mass. 82.

<sup>3</sup> *People v. Society for Propagation of the Gospel*, 2 Paine, 545; *Louisville, &c. R. Co. v. Covington*, 2 Bush, 526.

<sup>4</sup> *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. Rep. 550; *Poull v. Mockley*, 33 Wis. 482.

<sup>5</sup> *Hoyt v. Ketcham*, 54 Conn. 60, 5 Atl. Rep. 606. And see *Cleveland, &c. Ry. Co. v. Coburn*, 91 Ind. 557.

<sup>6</sup> See § 728; *Rice v. Boston & W. R. Co.* 12 Allen, 141; *Hooper v. Cummings*, 45 Me. 359; *People v. Society for Propagation of the Gospel*, 2 Paine, 545; *Tinkham v. Erie Ry. Co.* 53 Barb. 393.



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condition is extinguished by the conveyance.<sup>1</sup> But where one granted land upon a condition subsequent, taking back a mortgage for the purchase-price, his assignment of the mortgage to a stranger in the usual form passed to the assignee only the mortgage title, subject to be defeated by a breach of the condition in the original deed.<sup>2</sup> Under a condition that so much of the premises conveyed as should not be used for a purpose specified, a subsequent conveyance to a third person by the grantor of the part not used for such purpose, bounding the land by a line running along certain improvements made by the grantee, is an admission by the grantor that the land beyond such line was used or needed for use by the grantee for the purpose specified.<sup>3</sup>

697. A condition which is personal to the grantor, or for the benefit of the residue of his estate, is waived by a conveyance of such residue to the purchaser of the part to which the condition was attached. Thus, where the owner of a tract of land conveyed a small parcel of it with a condition that the grantee should support a fence around the land conveyed, and subsequently conveyed the residue to one who had become the owner of the small parcel, and this owner removed the fence, it was held that his removal of the fence was an extinguishment or waiver of the condition. The residue or part last conveyed was afterwards reconveyed to the original grantor, who entered upon the small parcel, claiming a forfeiture. But it was held that the condition, once having been waived or extinguished, was not revived by the reconveyance.<sup>4</sup>

698. A third person who is beneficially interested in the condition has no power to waive or release it, if the condition is such that the grantor may be supposed to have an interest in its performance, though such person in whose favor the condition is made is willing to waive its performance.<sup>5</sup> Only the grantor, or his heirs having the legal estate, can dispense with such a condition. A grantor, who has conveyed land on condition that he and his wife should be allowed to reside thereon during their respective lives and receive support from the grantee, may waive a

<sup>1</sup> *Rice v. Boston & W. R. Co.* 12 Allen, 141.

<sup>2</sup> *Merritt v. Harris*, 102 Mass. 326.

<sup>3</sup> *McKelway v. Seymour*, 29 N. J. L. 221.

<sup>4</sup> *Merrifield v. Cobleigh*, 4 Cush. 178.

<sup>5</sup> *Rowell v. Jewett*, 69 Ma. 293; *Gray v. Blanchard*, 8 Pick. 284, 292. See, *contra*, *Jones v. Bramblet*, 2 Ill. 276; *Boone v. Tipton*, 15 Ind. 270.

breach of the condition both as to himself and as to his wife, and his waiver is sufficient without any waiver by his wife, she having joined in the deed merely to release dower;<sup>1</sup> but it has been held that after the death of the grantor his widow may make a valid release to the grantor of such condition.<sup>2</sup>

699. A condition may be waived by acts as well as by express release.<sup>3</sup> If the grantor permits the property to be used in violation of the condition, and especially if he stands by and allows valuable improvements to be made thereon, he will not be allowed to insist upon a forfeiture, and thus acquire the improvements made upon the strength of his acquiescence.<sup>4</sup> Thus, where the condition was that no liquor should be sold on the property, but the grantee made such use of the land for eleven years, with the grantor's knowledge and without objection by him, and made improvements adapted to such use, equity will not permit a forfeiture of the estate, but will leave the grantor to his other remedies.<sup>5</sup> Thus, also, where land was granted to a railroad company upon condition that the road should be completed by a certain time, and, after the company's failure to do this, the grantor suffered the company to go on and incur further expense in constructing the road without making objection, it was held that he had waived the condition and forfeiture.<sup>6</sup> Any acts on the part of the grantor which are inconsistent with a claim of forfeiture are evidence of his waiver of the condition.<sup>7</sup>

700. A condition for the payment of money at a certain time is waived by the acceptance of the money after a breach.<sup>8</sup> If the condition is one for the payment of money at stated times, and preceding payments have been made without much regard to

<sup>1</sup> *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75.

<sup>2</sup> *Tanner v. Van Bibber*, 2 Duv. 550.

<sup>3</sup> *Guild v. Richards*, 16 Gray, 309; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168.

<sup>4</sup> *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168; *Hammond v. Port Royal Ry. Co.* 15 S. C. 10, 35; *Kenner v. American Contract Co.* 9 Bush, 202.

<sup>5</sup> *Lehigh Coal Co. v. Early*, 162 Pa. St. 338, 29 Atl. Rep. 736.

<sup>6</sup> *Ludlow v. N. Y. & H. R. Co.* 12 Barb. 440. And see *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Jones v. Bramblet*, 2 Ill. 276.

<sup>7</sup> *Andrews v. Senter*, 32 Me. 394; *Frost v. Butler*, 7 Me. 225, 22 Am. Dec. 199; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Spaulding v. Hallenbeck*, 39 Barb. 79.

<sup>8</sup> *Chalker v. Chalker*, 1 Conn. 79, 6 Am. Dec. 206; *Dougal v. Fryer*, 3 Mo. 40, 22 Am. Dec. 458.

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the precise time of their maturity, equity will not allow a forfeiture for a payment not made on the precise day it was due, but tendered a few days afterwards, when under the circumstances it would be grossly inequitable to allow a forfeiture.<sup>1</sup>

**701.** A breach of a condition to furnish support to the grantor is waived by his returning to the grantee after an absence and accepting support from him. "The person to whom such support is due always has the right to elect whether he will waive or insist upon a partial or full failure, for a brief time, to perform such a condition, as putting an end to the contract, and his right to support. The failure to perform, which will defeat the vesting of the title, should be a failure in substance, rather than of the letter of the contract. Otherwise, after years of faithful performance, one might lose or be divested of his estate by a technical or partial failure. Where both parties are living on the estate, and in some sense in possession, so that a reëntry is not required to terminate the conditional estate, it is more imperative that the grantor should by some unmistakable act indicate his intention to put an end to the contract for the vesting of the estate upon a failure to perform the condition. Exacting, or acquiescing thereafter in the performance of the condition is evidence for the jury, from which they would be warranted in inferring and finding that he did not insist upon ending of the contract for such non-performance, but that he still treated it as subsisting."<sup>2</sup>

**702.** Exacting or acquiescing in the further performance of a condition is a legal waiver of any acts then known to the grantor which otherwise might work a forfeiture. Even treating the condition as still subsisting and obligatory after an alleged breach of it is a sufficient waiver.<sup>3</sup> A breach of a condition to support is waived by continuing to accept it for a time afterwards.<sup>4</sup>

**703.** A waiver of a condition, whether precedent or subsequent, is implied if the grantor prevents its fulfilment, or absolutely refuses performance on his part. But such refusal, to

<sup>1</sup> *Shade v. Oldroyd*, 39 Kans. 313, 18 Pac. Rep. 198; *National Land Co. v. Perry*, 23 Kans. 140.

<sup>3</sup> *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75.

<sup>4</sup> *Hubbard v. Hubbard*, 97 Mass. 188.

<sup>2</sup> *Norton v. Perkins*, 67 Vt. 203, 213, 31 Atl. Rep. 148, per Ross, C. J.

amount to a waiver, must be absolute, and must be acted upon as such by the grantee. If the grantor, in a conveyance under which the vesting of the title is made to depend upon the grantee's paying a specified sum on or before a day named, notifies the grantee that he considers the deed as conferring an option only, and that he withdraws the option, this does not justify the grantee in failing to make or tender payment as provided, if he wishes to assert any right under the deed.<sup>1</sup>

**704.** A waiver of a breach of a condition may be presumed after a reasonable lapse of time has occurred without any assertion of right by the grantor under the condition; but it is incumbent upon the grantee to allege and prove such a lapse of time.<sup>2</sup> Waiver is a question of fact for the jury, and any evidence which shows an intention on the part of the grantor to waive his right to claim a forfeiture is admissible upon this question. Whether in any particular case there is a waiver is a matter of intention on the part of the grantor, to be ascertained from his acts and all the attendant circumstances of the case.<sup>3</sup>

Where the condition was that the grantee should fence the land and keep the fence in repair, and the land remained unfenced for fifty years, with the grantor's full knowledge of the breach of the condition, and without any complaint or entry by him, it was held that he had waived the condition.<sup>4</sup>

**705.** But a mere silent acquiescence in an act which constitutes a breach of a condition does not alone amount to a waiver of the right to claim a forfeiture.<sup>5</sup> Thus, where the condition was that intoxicating liquor should not be sold on the

<sup>1</sup> *Borst v. Simpson*, 90 Ala. 373, 7 So. Rep. 814; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

<sup>2</sup> *Hooper v. Cummings*, 45 Me. 359; *Andrews v. Senter*, 32 Me. 394; *Willard v. Henry*, 2 N. H. 120; *Ludlow v. New York & H. R. Co.* 12 Barb. 440; *Kinney v. Shelbyville (Ky.)*, 1 S. W. Rep. 472; *Kenner v. American Contract Co.* 9 Bush, 202; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168; *Berryman v. Schumaker*, 67 Tex. 312, 3 S. W. Rep. 46; *Hurto v. Grant (Iowa)*, 57 N. W. Rep. 899; *Lehigh Coal & N. Co. v. Early*, 34 W. N. Cas. 501, 29 Atl. Rep. 736.

<sup>3</sup> *Hammond v. Port Royal, &c. Ry. Co.*

15 S. C. 10, 35; *Plumb v. Tubbs*, 41 N. Y. 442, 449; *Merrifield v. Cobleigh*, 4 Cush. 178.

<sup>4</sup> *Hooper v. Cummings*, 45 Me. 359; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. Rep. 479.

<sup>5</sup> *Adams v. Ore Knob Copper Co.* 4 Hughes, 589; *Gray v. Blanchard*, 8 Pick. 284; *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115; *Lindsey v. Lindsey*, 45 Ind. 552, 567; *Rowell v. Jewett*, 69 Me. 293; *Frost v. Butler*, 7 Me. 225, 22 Am. Dec. 199; *Jackson v. Chrysler*, 1 Johns. Cas. 125; *Rose v. Hawley*, 118 N. Y. 502, 23 N. E. Rep. 904; *Clark v. Martin*, 49 Pa. St. 289.

premises, the mere sale of a glass of liquor to a third person in the presence of the grantor does not necessarily constitute a breach of the condition. The bodily presence of the grantor might under some circumstances be evidence of his assent to the sale, and under other circumstances it would not. At most it would be evidence to be submitted to the jury on the question of his assent.<sup>1</sup> An unauthorized sale by a third person, without the knowledge or fault of the grantee, would not work a forfeiture.<sup>2</sup> But open and public sales on the premises by the grantee's tenant, with the assent or with the knowledge of the grantee, and without reasonable diligence on his part to prevent it, will work a forfeiture.<sup>3</sup> If the grantee, as soon as he discovers that his tenant is selling spirituous liquors on the premises, procures his removal, he will save a forfeiture. It is not negligence on his part to make a lease without a condition that it should be void in case the lessee should sell intoxicating liquor, especially if the lease contains an agreement on the part of the lessee that he would not sell any article the sale of which would injure the grantee's title.<sup>4</sup>

But if the grantor stands by and allows the grantee to incur expense and make improvements with a view to conducting a business or doing acts which are a breach of the condition, the grantor's inaction may have the effect of a waiver of the condition.<sup>5</sup>

**706.** Where a condition is altered by a verbal agreement, but the grantee fails to perform the condition, either as originally expressed or as altered, the grantor is not precluded from claiming a forfeiture, as his consent to the change was conditional upon a compliance with the altered condition. The parol agreement for a change in the condition was not obligatory; but the grantor would be estopped to insist upon a forfeiture for a breach of a condition he had agreed to dispense with. His agreement, however, for a change of the condition, is not inconsistent with his

<sup>1</sup> *Plumb v. Tubbs*, 41 N. Y. 442, 449.

<sup>2</sup> *Collins Manuf. Co. v. Marcy*, 25 Conn. 242.

<sup>3</sup> *Collins Manuf. Co. v. Marcy*, 25 Conn. 242; *Lehigh Coal & N. Co. v. Early*, 162 Pa. St. 338.

<sup>4</sup> *Collins Manuf. Co. v. Marcy*, 25 Conn. 242.

<sup>5</sup> *Hooper v. Cummings*, 45 Me. 359; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. Rep. 168; *Kenner v. American Contract Co.* 9 Bush, 202; *Ludlow v. New York & C. R. Co.* 12 Barb. 440; *Lehigh Coal & N. Co. v. Early*, 162 Pa. St. 338.

right to insist upon a forfeiture when the grantee failed to comply with the condition in either form. Whether there was a waiver is a question of intention, and it was clear that the grantee did not intend to waive the original condition, except in case he should comply with the changed condition.<sup>1</sup>

But where a city made a deed to a corporation for a nominal consideration upon condition that the corporation should do two things, one of which it performed but failed to perform the other, the city agreed that the corporation might do something else instead, and extended the time for performance. Upon its failure to perform the substituted service, the city brought ejectment. It was held that the city could not recover, because the original condition had been waived and was gone forever, as a condition, and as if it had never been made a part of the deed.<sup>2</sup>

**707. A condition once waived is wholly gone.** The estate becomes absolute in the grantee, and cannot be divested by any future breach.<sup>3</sup> A release of condition in part may operate as a waiver in whole.<sup>4</sup> But such a release does not have this effect in equity, where a specific performance of the unreleased part of the condition is sought.<sup>5</sup>

But the waiver of one breach of a continuing condition, such as a condition for the payment of rent, or for making repairs, does not destroy the condition, but it may be enforced for a subsequent breach.<sup>6</sup>

### VIII. *Reentry for Forfeiture.*

**708. The title to land conveyed upon a condition subsequent vests in the grantee, and his failure to perform the condition does not divest the title.** The title is divested only upon the entry of the grantor or his heirs for the condition broken, or by a suit for the recovery of possession, or other act equivalent to an

<sup>1</sup> *Ragsdale v. Vicksburg & M. R. Co.* 62 Miss. 480.

<sup>2</sup> *Sharon Iron Co. v. Erie*, 41 Pa. St. 341.

<sup>3</sup> *Dumpor's Case*, 4 Coke Rep. 119, 1 Smith's Lead. Cas. 95; *Guild v. Richards*, 16 Gray, 309; *Rice v. Boston & W. R. Co.* 12 Allen, 141; *Merrifield v. Cobleigh*, 4 Cush. 178; *Williams v. Dakin*, 22 Wend. 201; *Ludlow v. New York & H. R. Co.* 12 Barb. 440; *Barrie v. Smith*,

47 Mich. 130, 10 N. W. Rep. 168; *Hammond v. Port Royal Ry. Co.* 15 S. C. 10, 35; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Dickey v. McCullough*, 2 Watts & S. 88.

<sup>4</sup> *Dakin v. Williams*, 17 Wend. 447.

<sup>5</sup> *Clark v. Martin*, 49 Pa. St. 289.

<sup>6</sup> *Dumpor's Case*, 1 Smith's Lead. Cas. 95, 98, note; *McKildoe v. Darracott*, 13 Gratt. 278.

entry. The possibility of reverter merely is not an estate in land, and until the contingency of the condition happens the whole title is in the grantee, and the grantor has nothing he can convey.<sup>1</sup>

Non-performance of the condition, or a breach of it, does not of itself determine the grantee's estate, though it is provided that upon breach the estate shall be void, or shall revert to the grantor.<sup>2</sup>

<sup>1</sup> *Ruch v. Rock Island*, 97 U. S. 693; *Davis v. Gray*, 16 Wall. 203; *Schulenberg v. Harriman*, 21 Wall. 44. **Arkansas**: *Worthen v. Ratcliffe*, 42 Ark. 330; *Skipwith v. Martin*, 50 Ark. 141, 6 S. W. Rep. 514. **California**: Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant duly acknowledged, for record. Civ. Code, § 1109. **Colorado**: *Denver, &c. Ry. Co. v. School Dist.* 14 Colo. 327, 23 Pac. Rep. 978. **Georgia**: *Norris v. Milner*, 20 Ga. 563; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682. Upon breach of condition subsequent, working a forfeiture, the person to whom the estate is limited may enter immediately. Code 1882, § 2299. **Idaho**: Same statutory provision as in California. R. S. 1887, § 2931. **Indiana**: *Cory v. Cory*, 86 Ind. 567, 573; *Elkhart Car Works v. Ellis*, 113 Ind. 215, 15 N. E. Rep. 249; *Lindsey v. Lindsey*, 45 Ind. 552; *Throp v. Johnson*, 3 Ind. 343; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 742. **Kentucky**: *Ricketts v. Louisville, &c. Ry. Co.* 91 Ky. 221, 15 S. W. Rep. 182; *Myers v. Daviess*, 10 B. Mon. 394; *Kenner v. American Contract Co.* 9 Bush, 202. **Maine**: *Osgood v. Abbott*, 58 Me. 73; *Tallman v. Snow*, 35 Me. 342; *Chapman v. Pingree*, 67 Me. 198. **Massachusetts**: *Guild v. Richards*, 16 Gray, 309; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Shattuck v.*

*Hastings*, 99 Mass. 23. **Michigan**: *Hayward v. Kinney*, 84 Mich. 591, 599, 48 N. W. Rep. 170. **Minnesota**: *Chute v. Washburn*, 44 Minn. 312, 46 N. W. Rep. 555. **Mississippi**: *Memphis, &c. R. Co. v. Neighbors*, 51 Miss. 412. **Missouri**: *Adams v. Lindell*, 5 Mo. App. 197; *O'Brien v. Wagner*, 94 Mo. 93, 7 S. W. Rep. 19. **Nevada**: *Hamilton v. Kneeland*, 1 Nev. 40. **New Hampshire**: *Coon v. Brickett*, 2 N. H. 163; *Barker v. Cobb*, 36 N. H. 344. **New Jersey**: *State v. Brown*, 27 N. J. L. 13; *New Jersey Zinc & Iron Co. v. Morris Canal, &c. Co.* 44 N. J. Eq. 398, 15 Atl. Rep. 227. **New York**: *Vail v. Long Island R. Co.* 106 N. Y. 283, 12 N. E. Rep. 607; *Duryee v. New York*, 96 N. Y. 477; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; *Underhill v. Saratoga R. Co.* 20 Barb. 455; *Ludlow v. New York, &c. R. Co.* 12 Barb. 440; *Fonda v. Sage*, 46 Barb. 109. **North Carolina**: *Phelps v. Chesson*, 12 Ired. 194. **Oklahoma**: Same provision as in California. G. S. 1893, ch. 82, § 10. **Texas**: *Berryman v. Schumaker*, 67 Tex. 312, 3 S. W. Rep. 46; *Gulf, &c. R. Co. v. Dunman*, 74 Tex. 265, 11 S. W. Rep. 1094.

<sup>2</sup> *Adams v. Ore Knob Copper Co.* 4 Hughes, 589; *Osgood v. Abbott*, 58 Me. 73; *Adams v. Lindell*, 5 Mo. App. 197; *Towle v. Smith*, 2 Rob. (N. Y.) 489; *Stuyvesant v. Davis*, 9 Paige, 427; *Phelps v. Chesson*, 12 Ired. 194; *O'Brien v. Wagner*, 94 Mo. 93, 7 S. W. Rep. 19.

See *Thrall v. Spear*, 63 Vt. 266, 22 Atl. Rep. 414.

Where there is no grant of the fee there can be no forfeiture.<sup>1</sup>

If the condition is one that the law will not enforce, the estate vests absolutely in the grantee upon the conveyance.<sup>2</sup>

709. If the grantor reserves to himself some special remedy for a breach of the condition, other than a forfeiture of the estate, he may be limited to that remedy.<sup>3</sup>

710. The grantor may prefer some other remedy than a forfeiture for a breach of condition. He may prefer, by a proceeding in equity, to enjoin the grantee from doing something in violation of the terms of the condition.<sup>4</sup> He may maintain a bill for the specific performance of the terms of a condition; or he may maintain an action for damages sustained by reason of a breach of the condition.<sup>5</sup>

711. Until forfeiture is enforced, the grantee may convey or devise the estate, and upon his death it descends like an estate not subject to condition. The condition may be enforced against the property, whoever may be the owner of it. "The condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that although the same do pass through the hands of an hundred men, yet it is subject to the condition still."<sup>6</sup> Such a condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. The grantee may mortgage his interest, and until his estate is defeated by the person entitled to defeat it, the mortgagee has the right to enforce his security to the same extent as if the condition were not contained in the deed.<sup>7</sup>

Unless the condition is personal it may be performed by any one to whom the title may have passed by conveyance, devise, or descent, or by any one who has an interest in it.<sup>8</sup>

The mere sale and conveyance by the grantee of the land,

<sup>1</sup> *Lake Erie & W. R. Co. v. Ziebarth* (Ind.), 33 N. E. Rep. 256.

<sup>2</sup> *Parker v. Parker*, 123 Mass. 584; *Philadelphia v. Girard*, 45 Pa. St. 9, 84 Am. Dec. 470; *Reifsnyder v. Hunter*, 19 Pa. St. 41; *Walker v. Vincent*, 19 Pa. St. 369; *Barkadale v. Elam*, 30 Miss. 694.

<sup>3</sup> *Hoyt v. Kimball*, 49 N. H. 322.

<sup>4</sup> *St. Paul, & Ry. Co. v. St. Paul U. D. Co.* 44 Minn. 325, 46 N. E. Rep. 566.

<sup>5</sup> *Stuyvesant v. Mayor*, 11 Paige, 414.

<sup>6</sup> *Shep. Touch.* 119; *Jackson v. Top-*

*ping*, 1 Wend. 388, 19 Am. Dec. 515; *Wilson v. Wilson*, 38 Me. 18, 61 Am. Dec. 227; *Louisville, &c. R. Co. v. Covington*, 2 Bush, 526; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682.

<sup>7</sup> *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. Rep. 170.

<sup>8</sup> *Marks v. Marks*, 10 Mod. 419; *Wilson v. Wilson*, 38 Me. 18, 61 Am. Dec. 227; *People v. Society for Propagation of the Gospel*, 2 Paine, 545; *Louisville, &c. R. Co. v. Covington*, 2 Bush, 526.



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which is subject to a condition that the same shall be used for certain purposes only, is not a breach of the condition, in the absence of a showing that the grantee has diverted the land to other purposes.<sup>1</sup>

712. Upon a reëntry by the grantor the estate reverts in him as a matter of legal right, with the same estate he had before the grant, and with all the improvements the grantee may have made upon the land.<sup>2</sup> But without some act on the part of the grantor or his heirs, by which to take advantage of the condition and its forfeiture, the estate remains in the grantee, even though the words of the condition are that "the estate shall thereupon be void and of no effect."<sup>3</sup>

After the grantor has entered upon the land for a breach of the condition, the land is not subject to attachment for the debts of the grantee contracted while he was in possession;<sup>4</sup> and any lien or incumbrance obtained upon the land by a third person after the creation of the condition is destroyed.<sup>5</sup>

713. In case of a conditional limitation, no right of reëntry remains in the grantor. If a condition subsequent be followed by a limitation over, in case the condition is not complied with, it is termed a conditional limitation, and takes effect without any entry or claim, and no act is necessary to vest the estate in the party to whom it is limited.<sup>6</sup> If an estate be granted to one on condition that within two years he return from Rome, and on failure thereof then to another and his heirs, this is a limitation and not a condition.<sup>7</sup>

There are important distinctions between an estate upon condition and an estate on a conditional limitation, the most important of which is that in case of the former the grantor has remaining a right of reverter and reëntry, while in the case of the latter he

<sup>1</sup> Taylor v. Binford, 37 Ohio St. 262.

<sup>2</sup> Barker v. Cobb, 36 N. H. 344; Brattle Square Church v. Grant, 3 Gray, 142, 63 Am. Dec. 725; Rowell v. Jewett, 71 Me. 408; Thomas v. Record, 47 Me. 500, 64 Am. Dec. 500; Bartlett v. Jones, 60 Me. 246; Dolan v. Baltimore, 4 Gill, 394; Scott v. Stipe, 12 Ind. 74; Hershman v. Hershman, 63 Ind. 451. See, however, De Peyster v. Michael, 6 N. Y. 467.

<sup>3</sup> Phelps v. Chesson, 12 Ired. 194.

<sup>4</sup> Schlesinger v. Kansas City, &c. R. Co. 152 U. S. 444, 14 Sup. Ct. Rep. 647.

<sup>5</sup> Thomas v. Record, 47 Me. 500, 74 Am. Dec. 500; Moore v. Pitts, 53 N. Y. 85.

<sup>6</sup> Stearns v. Godfrey, 16 Me. 158; Brattle Square Church v. Grant, 3 Gray, 142, 63 Am. Dec. 725; Attorney-General v. Merrimack Manuf. Co. 14 Gray, 586; Ashley v. Warner, 11 Gray, 43; Miller v. Levi, 44 N. Y. 489.

<sup>7</sup> 2 Black. Com. 155.

has no such right. "Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains, after the gift or grant takes effect, continues in the grantor and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter, as of their old estate, upon breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or deviser immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate by the same instrument passes out of the grantor or deviser. . . . The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation, which is to take effect on the breach of the condition."<sup>1</sup>

714. The right or possibility of reverter upon a breach of a condition subsequent is not within the rule against perpetuities.<sup>2</sup> "The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not, therefore, fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law, which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over, being executory and depending upon a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect."<sup>3</sup>

<sup>1</sup> *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725, per Bigelow, J.

<sup>2</sup> *Tobey v. Moore*, 130 Mass. 448; *French v. Old South Soc.* 106 Mass. 479.

<sup>3</sup> *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725, per Bigelow, J.

The right or possibility of reverter upon the determination of a qualified fee is governed by the same rule in regard to remoteness as the right of reverter upon a condition subsequent, and is not void on that account.<sup>1</sup>

Whether estates upon condition are subject to the rule against perpetuities, so that if the condition is perpetual and the conditional estate may not arise or vest until after the period limited by that rule, it is void, or whether it would then vest in the grantor, his heir or devisee, is a question which must be considered as unsettled.<sup>2</sup>

**715. The common-law remedy for enforcing the forfeiture of a condition is an entry.** Actual entry, or, if that was impossible, a claim, was the original mode of enforcing forfeiture. "Regularly, when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim; and the reason is, for that a freehold and inheritance shall not cease without entry or claim."<sup>3</sup> The claim applied to things that did not lie in livery, and of which there could be no possession, such as a reversion or remainder. The bringing of an action of disseisin was not a claim within the meaning of the law, nor a substitute for an actual entry. Claim was what was in the books called "continued claim."<sup>4</sup> As by the old common law a freehold could be created only by the ceremony of livery of seisin, the corresponding ceremony of reentry was necessary in order to determine it, or, as Coke has it, "an estate of freehold cannot begin nor end without ceremony."<sup>5</sup> But no actual entry was required upon the breach of a condition subsequent in an estate for years or an incorporeal hereditament, for such an estate was not created by a livery of seisin.<sup>6</sup> The grantor parted with

<sup>1</sup> *First Universalist Soc. v. Boland*, 155 Mass. 171, 29 N. E. Rep. 524, Allen, J., saying: "The very many cases cited in Gray, Prop. §§ 305-312, show conclusively that the general understanding of courts and of the profession in America has been that the rule as to remoteness does not apply, though the learned author thinks this view erroneous in principle."

<sup>2</sup> 1 Am. Law Rev. 265, article by F. C. Loring, Esq.; *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725, a case of conditional limitation.

<sup>3</sup> Co. Litt. 218 a; Shep. Touch. 153.

<sup>4</sup> It is explained by Littleton, § 414.

<sup>5</sup> Co. Litt. 214 b. But a lease for years might begin without ceremony, and so might end without ceremony. A condition annexed to a lease for years did not therefore require an actual entry to enforce it, unless an entry is stipulated. Ejectment may be maintained without an actual entry. *Liddy v. Kennedy*, L. R. 5 H. L. 134.

<sup>6</sup> 4 Kent, 128; *Kenner v. American Contract Co.* 9 Bush, 202.

his seisin when he made his conveyance upon condition, and he could regain this only by a reëntury. No action for the recovery of the land could be brought by the grantor until he had made entry upon the land after condition broken, or made claim if entry was impossible. This was the early rule in some of the States,<sup>1</sup> and in North Carolina and South Carolina it remains the rule to the present time.<sup>2</sup>

If several detached parcels of land are conveyed by the same deed, and are subject to the same condition, an entry upon one lot in the name of all the lots situated in the same county is sufficient.<sup>3</sup>

**716. An entry to enforce a forfeiture must be made for the purpose of taking advantage of the breach of condition.** If it is made for some other purpose, it is not effective to divest the grantee of his estate by reason of his breach of the condition, and does not lay the foundation for a recovery in ejectment by the grantor.<sup>4</sup> The entry, moreover, in the language of the Touchstone,<sup>5</sup> should be "an open and notorious act, equivalent to investiture of land by livery of seisin, that notoriety might be given to the change of title." It is not necessary, however, that the

<sup>1</sup> *Chalker v. Chalker*, 1 Conn. 79, 6 Am. Dec. 206; *Bowen v. Bowen*, 18 Conn. 535; *Warner v. Bennett*, 31 Conn. 468, 478; *Kenner v. American Contract Co.* 9 Bush, 202; *Willard v. Henry*, 2 N. H. 120; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391; *Jewett v. Berry*, 20 N. H. 36; *Rollins v. Riley*, 44 N. H. 9; *Tallman v. Snow*, 35 Me. 342; *Frost v. Butler*, 7 Me. 225, 22 Am. Dec. 199; *Marwick v. Andrews*, 25 Me. 525; *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657; *Osgood v. Abbott*, 58 Me. 73; *Throp v. Johnson*, 3 Ind. 343; *Boone v. Tipton*, 15 Ind. 270; *Voris v. Renshaw*, 49 Ill. 425; *Board of Education v. Trustees*, 63 Ill. 204; *Phelps v. Chesson*, 12 Ired. 194; *Hammond v. Port Royal, &c. R. Co.* 15 S. C. 10; *Memphis, &c. C. R. Co. v. Neighbors*, 51 Miss. 412. In *Massachusetts* an entry was necessary before the Revised Statutes of 1836, which provided that the demandant in a real action shall not be required to prove an actual entry, and that proof of the right

to enter shall be deemed sufficient proof of seisin. This applies to an action founded on a breach of condition. *Austin v. Cambridgeport Parish*, 21 Pick. 215. See *Stearns v. Harris*, 8 Allen, 597. It has been suggested, however, that *Stone v. Ellis*, 9 Cush. 95; *Sanborn v. Woodman*, 5 Cush. 36, and *Attorney-General v. Merrimack Manuf. Co.* 14 Gray, 586, 612, are inconsistent. 1 Am. Law Rev. 265, 269; article by F. C. Loring, Esq. *Hubbard v. Hubbard*, 97 Mass. 188, decides that an action is equivalent to an entry.

<sup>2</sup> *Adams v. Ore Knob Copper Co.* 4 Hughes, 589, 593; *Hammond v. Port Royal Ry. Co.* 15 S. C. 10.

<sup>3</sup> Litt. § 417; Co. Litt. 252b; *Green v. Pettingill*, 47 N. H. 375, 93 Am. Dec. 444.

<sup>4</sup> *Bowen v. Bowen*, 18 Conn. 535; *Stone v. Ellis*, 9 Cush. 95.

<sup>5</sup> *Shep. Touch.* 153.

party entering should declare at the time for what purpose he enters. The act speaks for itself.<sup>1</sup>

The reëntry must be made after a breach of the condition; if made before a breach it may excuse the breach, because it may render performance impossible.<sup>2</sup> It must be made upon the land of which forfeiture is claimed.<sup>3</sup>

717. It would seem that the ceremony of reëntry for the breach of a condition ought to be dispensed with, inasmuch as under the Statute of Uses the ceremony of livery of seisin is dispensed with in the creation of freehold estates. Accordingly, at the present day, this ceremony is not generally necessary before the prosecution of an action for the recovery of possession. "Whatever necessity there may have anciently been for such a proceeding, the reason for it ceased with the disappearance of the fictions and devices resorted to, upon which to found the action of ejectment."<sup>4</sup>

718. It is a general rule that a writ of ejectment, a writ of entry, or a suit for the possession of the land, is equivalent to a reëntry.<sup>5</sup> So any act equivalent to an entry by the grantor

<sup>1</sup> *Jones v. Williams*, 5 B. & Ad. 783, per Lord Denman; *Bowen v. Bowen*, 18 Conn. 535; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. Rep. 354.

<sup>2</sup> *Elkhart Car Works Co. v. Ellis*, 113 Ind. 215, 15 N. E. Rep. 240.

<sup>3</sup> *Missouri Hist. Soc. v. Academy of Sciences*, 94 Mo. 459, 8 S. W. Rep. 346.

<sup>4</sup> *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 307, 51 N. W. Rep. 905, per Dickinson, J.; *Clark v. Holton*, 57 Ind. 564; *Hamilton v. Kneeland*, 1 Nev. 40; *Ritchie v. Kansas, &c. Ry. Co. (Kans.)* 39 Pac. Rep. 718.

<sup>5</sup> *Goodright v. Cator*, Doug. 485, per Lord Mansfield; *Ruch v. Rock Island*, 97 U. S. 693. **Colorado**: *Cowell v. Springs Co.* 3 Colo. 82, 100 U. S. 55. **Illinois**: *Boone v. Clark*, 129 Ill. 466, 498, 21 N. E. Rep. 850. **Indiana**: *Richter v. Richter*, 111 Ind. 456, 12 N. E. Rep. 698; *Indianapolis, &c. Ry. Co. v. Hood*, 66 Ind. 580; *Wilson v. Wilson*, 86 Ind. 472; *Cleveland, &c. Ry. Co. v. Coburn*, 91 Ind. 557; *Clark v. Holton*, 57 Ind. 564; *Scott v. Stipe*, 12 Ind. 74. **Kansas**: *Ritchie v. Kansas, &c.*

*Ry. Co. (Kans.)* 39 Pac. Rep. 718; *O'Brien v. Wetherell*, 14 Kans. 616. **Kentucky**: *Louisville & Nashville R. Co. v. Covington*, 2 Bush, 526; *Owensboro & N. Ry. Co. v. Griffeth (Ky.)*, 17 S. W. Rep. 277. **Massachusetts**: *R. S.* 1836, ch. 101, §§ 4, 8; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75. **Minnesota**: *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 51 N. W. Rep. 905. **Missouri**: *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243; *O'Brien v. Wagner*, 94 Mo. 93, 7 S. W. Rep. 19; *Ellis v. Kyger*, 90 Mo. 606; *Missouri Hist. Soc. v. Academy*, 94 Mo. 459, 8 S. W. Rep. 346; *Towne v. Bowers*, 81 Mo. 491; *Weinreich v. Weinreich*, 18 Mo. App. 364. **New Jersey**: *Cornelius v. Ivins*, 26 N. J. L. 376. **New York**: *Jackson v. Chrysler*, 1 Johns. Cas. 125; *Plumb v. Tubbs*, 41 N. Y. 442, 450; *Hosford v. Ballard*, 39 N. Y. 147; *Palmer v. Plank Road Co.* 11 N. Y. 376; *Cruiger v. McLaury*, 41 N. Y. 219; *Upington v. Corrigan*, 69 Hun, 320, 23 N. Y. Supp. 451. **Oregon**: *Coffin v. Portland*, 16 Oreg.

showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such, is all that is required. The trustees of a railroad company had conveyed the road to a construction company upon condition that the road should be completed within a certain time, and upon failure of the construction company to fulfil the condition, the trustees entered into a contract with a railway company already in possession of the property, reciting the condition and declaring a forfeiture under it. It was held that, the trustees having elected to treat the property as reverted to them, and their action being equivalent, without judicial proceedings, to a reentry, the interest of the construction company in the property was divested at the expiration of the time limited for performance of the conditions, and the property could not be subjected, by a suit brought after that time, to a judgment against the construction company recovered by complainants on the contract for the rails.<sup>1</sup>

**719.** Where a corporation holding land upon a condition subsequent is dissolved for acts or omissions which are also breaches of the condition, the title reverts to the original grantor without any entry by him or other act equivalent thereto. The dissolution of the corporation by judicial decree supersedes the necessity of a reentry.<sup>2</sup>

**720.** The action of ejectment to enforce a forfeiture of a condition may be maintained against subsequent purchasers from the original grantee upon condition. "It cannot be urged that it is even a hard case against such defendant, for he purchased with full knowledge of the condition; or, if not, it behooved him to inquire and examine the title before he purchased."<sup>3</sup>

77, 17 Pac. Rep. 580; *Raley v. Umatilla Co.* 15 Oreg. 172, 13 Pac. Rep. 890. **Pennsylvania:** *Bear v. Whisler*, 7 Watts, 144; *Cook v. Trimble*, 9 Watts, 15; *Sheafer v. Sheafer*, 37 Pa. St. 525; *Brown v. Bennett*, 75 Pa. St. 420; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341. **South Carolina:** *Rugge v. Ellis*, 1 Bay, 107, 111. **Texas:** *Jeffery v. Graham*, 61 Tex. 481; *Gulf, &c. Ry. Co. v. Dunman*, 74 Tex. 265, 11 S. W. Rep. 1094. **West Virginia:** By statute, ejectment serves in lieu of reentry. Code, ch. 93, § 16; *Martin v.*

*Ohio R. Co.* 37 W. Va. 349, 16 S. E. Rep. 589, 590. An action of unlawful entry and detainer is not sufficient. *Bowker v. Seymour*, 13 W. Va. 12. **Wisconsin:** *Pepin Co. v. Prindle*, 61 Wis. 301, 21 N. W. Rep. 254; *Horner v. Railway Co.* 38 Wis. 165.

<sup>1</sup> *Schlesinger v. Kansas City, &c. R. Co.* 152 U. S. 444, 14 Sup. Ct. Rep. 647.

<sup>2</sup> *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. Rep. 927.

<sup>3</sup> *Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515; *Martin v. Ohio R. Co.* 37

§§ 721-723.] CONDITIONS PRECEDENT AND SUBSEQUENT.

721. The parties themselves may by a stipulation in the deed provide what shall constitute a reëntury for a forfeiture, or what shall be the evidence of such reëntury. Thus they may stipulate that the grantor shall post a notice of reëntury upon the land, and that within a specified time thereafter the land shall be considered as revested in the grantor, and such act will constitute a reëntury, and after the expiration of such time will defeat the purchaser's title.<sup>1</sup>

722. If the grantor is himself in possession when the condition is broken, the estate reverts in him at once, and his possession is presumed to be for the purpose of holding under the forfeiture.<sup>2</sup> If he is already in possession, it is, however, in some cases declared that the grantor must manifest an intention of holding by reason of the breach of condition;<sup>3</sup> and facts showing that the grantee in possession, after breach of the condition, exercised acts of ownership, or that the grantor residing with the grantee acknowledged the title of the latter and disclaimed any title in himself, are admissible in evidence to show that the grantor was not in possession for a forfeiture.<sup>4</sup> He may thereafter maintain an action to quiet the title, but to do this he must allege a breach of the condition, and a reëntury because of such breach. Such an action could not be sustained upon an allegation of a reëntury before breach.<sup>5</sup>

723. Only the grantor or his heirs can enforce a condition. He or they alone can enter for a breach of the condition. A condition and a right of reëntury for a forfeiture cannot be reserved to a stranger. "No entry nor reëntury (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and such reëntury

W. Va. 349, 16 S. E. Rep. 589; Guffy v. Hukill, 34 W. Va. 49, 11 S. E. Rep. 754.

<sup>1</sup> Swoll v. Oliver, 61 Ga. 248.

<sup>2</sup> Adams v. Ore Knob Copper Co. 4 Hughes, 589; Willard v. Henry, 2 N. H. 120; Rollins v. Riley, 44 N. H. 9; Andrews v. Senter, 32 Me. 394; Frost v. Butler, 7 Me. 225, 22 Am. Dec. 199; Richter v. Richter, 111 Ind. 456, 12 N. E. Rep. 698; Clark v. Holton, 57 Ind. 564; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; O'Brien v. Wagner, 94 Mo. 93, 7

S. W. Rep. 19; Hamilton v. Elliott, 5 S. & R. 375; Taylor v. Cedar Rapids & St. P. R. Co. 25 Iowa, 371.

<sup>3</sup> Willard v. Henry, 2 N. H. 120; Hubbard v. Hubbard, 97 Mass. 188, 93 Am. Dec. 75. And see Lincoln & K. Bank v. Drummond, 5 Mass. 321.

<sup>4</sup> Drew v. Baldwin, 48 Wis. 529, 4 N. W. Rep. 576.

<sup>5</sup> Elkhart Car Co. v. Ellis, 113 Ind. 215, 15 N. E. Rep. 249; Richter v. Richter, 111 Ind. 456, 12 N. E. Rep. 698.

cannot be given to any other person."<sup>1</sup> A condition expressly made in favor of a stranger to the deed is void.<sup>2</sup> But it is no objection to a condition that the benefit of it is in favor of a stranger, the condition itself being in favor of the grantor.<sup>3</sup> A condition in express terms, that the grantee shall not build upon a certain part of the land conveyed, cannot be enforced by the owner of the adjacent property who derived his title from the same grantor. The grantor or his heirs must enforce the condition.<sup>4</sup>

<sup>1</sup> Littleton, § 347; Co. Litt. § 214 a; Shep. Touch. 127. "And therefore, if an estate be made upon condition that upon such a contingent a stranger shall enter, or the estate shall cease, and another shall have it; however this may be so drawn as it may be a good condition to give him, his heirs, etc., that doth make the estate, an entry, yet it cannot be good to give the estate, or the entry, to a stranger." Mr. Justice Field, in *Schulenberg v. Harriman*, 21 Wall. 44, 63, said: "It is settled law that no one can take advantage of the non-performance of a condition subsequent, annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way, from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed." *Ruch v. Rock Island*, 97 U. S. 693; *Schulenberg v. Harriman*, 21 Wall. 44; *People v. Society for Propagation of the Gospel*, 2 Paine, 545. **California**: *Smith v. Brannan*, 13 Cal. 107; *Buckelew v. Estell*, 5 Cal. 108. **Georgia**: *Norris v. Milner*, 20 Ga. 563. **Illinois**: *Board of Education v. Trustees*, 63 Ill. 204; *Neimeyer v. Knight*, 98 Ill. 222; *Boone v. Clark*, 129 Ill. 466, 21 N. E. Rep. 850. **Indiana**: *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 742;

*Copeland v. Copeland*, 89 Ind. 29; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. Rep. 442. **Arkansas**: *Martin v. Skipwirth*, 50 Kans. 141, 6 S. W. Rep. 514. **Kansas**: *Piper v. Union Pac. Ry. Co.* 14 Kans. 568; *McElroy v. Morley*, 40 Kans. 76, 19 Pac. Rep. 341. **Kentucky**: *Owsley v. Owsley*, 78 Ky. 257. **Maine**: *Hooper v. Cummings*, 45 Me. 359; *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657. **Maryland**: *Dolan v. Baltimore*, 4 Gill, 394. **Massachusetts**: *Guild v. Richards*, 16 Gray, 309, 317; *Parker v. Nichols*, 7 Pick. 111; *King's Chapel v. Pelham*, 9 Mass. 501. **Michigan**: *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. Rep. 170. **Mississippi**: *Winn v. Cole*, Walk. 119. **Missouri**: *Towne v. Bowers*, 81 Mo. 491; *Jones v. St. Louis, &c. Ry. Co.* 79 Mo. 92. **New Hampshire**: *Dewey v. Williams*, 40 N. H. 222, 77 Am. Dec. 708. **New York**: *Van Rensselaer v. Ball*, 19 N. Y. 100; *Fonda v. Sage*, 46 Barb. 109; *Underhill v. Saratoga, &c. R. Co.* 20 Barb. 455; *Post v. Weil*, 8 Hun, 418; *Nicoll v. New York, &c. R. Co.* 12 N. Y. 121, 12 Barb. 460. **New Jersey**: *Southard v. Central R. Co.* 26 N. J. L. 13. **Pennsylvania**: *Cushman v. Church*, 14 Pa. Co. Ct. 26.

<sup>2</sup> *Craig v. Wells*, 11 N. Y. 315; *Nicholl v. New York & E. R. Co.* 12 N. Y. 121; *Littlefield v. Mott*, 14 R. I. 288; *Gray v. Blanchard*, 8 Pick. 284. To contrary, see *McKisick v. Pickle*, 16 Pa. St. 140; *Hamilton v. Kneeland*, 1 Nev. 40.

<sup>3</sup> *Gibert v. Peteler*, 38 N. Y. 165.

<sup>4</sup> *McElroy v. Morley*, 40 Kans. 76, 19 Pac. Rep. 341.



§§ 724, 725.] CONDITIONS PRECEDENT AND SUBSEQUENT.

Where a husband and wife joined in a conveyance of land of which the husband was seised in fee, on condition that the grantee should support each of them for life, and the grantors were afterwards divorced, it was held that the husband only could enforce the condition. The wife's inchoate and contingent interest in the land did not entitle her to claim a forfeiture.<sup>1</sup>

A condition in a deed conveying land to one for life, with remainder to his heirs, prohibiting a conveyance of the land during the lifetime of the tenant for life, can be enforced only by the grantor and his heirs; and hence strangers in possession of the land cannot resist the foreclosure of a mortgage executed by the life tenant on the ground that it violated the condition in the deed.<sup>2</sup>

**724.** The grantor's heirs, though not mentioned in the deed, may take advantage of a breach of condition by entry after the grantor's death; and it does not matter that no estate descended to the heirs from the grantor.<sup>3</sup>

When the deed is by a corporation, its successor may take advantage of a forfeiture.<sup>4</sup>

**725.** The State must enforce a condition by proceedings equivalent to an inquest of office. At common law, in a grant by the crown, as the sovereign could not make an entry for a breach of condition in person, it was necessary to assert the right by an inquest of office, or office-found.<sup>5</sup> But now the state or government may provide by legislation the mode of asserting this right. Mr. Justice Field, in a case before the Supreme Court of the United States, said:<sup>6</sup> "If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that

<sup>1</sup> *Copeland v. Copeland*, 89 Ind. 29.

<sup>2</sup> *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. Rep. 170.

<sup>3</sup> *Shep. Touch.*; *Osgood v. Abbott*, 58 Me. 73; *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500; *Jackson v. Toppling*, 1 Wend. 388, 19 Am. Dec. 515; *Warner v. Bennett*, 31 Conn. 468.

<sup>4</sup> *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 742; *Southard v. Central R. Co.* 26 N. J. L. 13, 21.

<sup>5</sup> *People v. Brown*, 1 Caines, 416.

<sup>6</sup> *Schulenberg v. Harriman*, 21 Wall. 44, 63.

it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office-found was necessary to determine the estate: but, as said by this court in a late case,<sup>1</sup> 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.' So, also, any public assertion by legislative act of the ownership of the estate after default of the grantee—such as an act resuming control and appropriating the property to particular uses, or granting it to others to carry out the original object—will revest the property in the state.<sup>2</sup>

726. If the condition be for the payment of money to a third person, while at common law this does not create a privity between the grantee and such third person, yet there is a tendency in modern adjudications to treat such a condition as raising a trust in favor of the beneficiary, which he may enforce.<sup>3</sup>

727. It is a settled common-law principle that a condition can be reserved only to the grantor and his heirs, and not to a stranger, and the reason of the rule is that the estate is not defeated, though the condition be broken, until entry by the grantor or his heirs, and until such entry there is nothing to assign save a mere right of entry, which at common law is not assignable.<sup>4</sup>

But this rule does not apply to a subsequent purchaser in fee of land burdened with an easement granted upon condition. Such purchaser may enforce the performance of the condition upon which his grantor had conveyed to another an easement in the land.<sup>5</sup>

728. The right to enforce a condition does not pass by a deed of the reversion, or by conveyance of the land which is subject to the condition. After such a conveyance there is no

<sup>1</sup> *United States v. Repentigny*, 5 Wall. 211, 268.

<sup>2</sup> *Farnsworth v. Minn. & P. R. Co.* 92 U. S. 49, 66; *New Orleans Pac. R. Co. v. United States*, 124 U. S. 124, 130, 8 Sup. Ct. Rep. 417; *Schlesinger v. Kansas City, &c. R. Co.* 152 U. S. 444, 453, 14 Sup. Ct. Rep. 647.

<sup>3</sup> *Weinreich v. Weinreich*, 18 Mo. App. 364, per Thompson, J., citing *Smith v.*

*Jewett*, 40 N. H. 530; *Sherman v. Dodge*, 28 Vt. 26; *Rogers v. Gosnell*, 51 Mo. 466; *Ralphsnyder v. Ralphsnyders*, 17 W. Va. 28; *Owsley v. Owsley*, 78 Ky. 257. *Contra*, *Kellam v. Kellam*, 2 Pat. & H. 357.

<sup>4</sup> *Nicoll v. N. Y. & E. R. Co.* 12 Barb. 460, 12 N. Y. 121.

<sup>5</sup> *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. Rep. 550.

person capable of making an entry or claim; the grantor cannot, for he has parted with his interest; the grantee cannot, because he is a stranger to the condition. The right of entry for condition broken is not assignable at common law.<sup>1</sup>

729. The reason for this is that nothing that lies in action, entry or reëntury, can be granted over. To allow such an assignment would be to encourage maintenance.<sup>2</sup> The rule is the same whether the breach was before or after the assignment. By a general assignment made by the grantor to a third person of all his property, the condition is gone, and the grantee's estate becomes absolute, discharged from the condition.<sup>3</sup> And so, if the

<sup>1</sup> *Ruch v. Rock Island*, 97 U. S. 693; *People v. Society for Propagation of the Gospel*, 2 Paine, 545; *Guild v. Richards*, 16 Gray, 309; *Rice v. Boston & W. R. Co.* 12 Allen, 141; *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455; *Parsons v. Miller*, 15 Wend. 561; *Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; *Stevens v. Pillsbury*, 57 Vt. 205, 52 Am. Rep. 121; *Hooper v. Cummings*, 45 Me. 359; *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657; *Martin v. Ohio R. Co.* 37 W. Va. 349, 16 S. E. Rep. 589; *Hoyt v. Ketcham*, 54 Conn. 60, 5 Atl. Rep. 606; *Warner v. Bennett*, 31 Conn. 468; *Paul v. Connersville, &c. R. Co.* 51 Ind. 527; *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. Rep. 442. In California the right of reëntury can be transferred. Civ. Code, § 1046. In England it was made assignable by 8 & 9 Vict. ch. 106, § 6.

In Connecticut it is now provided by statute that when, after an estate has been created by grant upon express condition, the reversion shall, before breach of such condition, become vested in any person other than the grantor or his heirs, such person shall, on breach of such condition, have the same right of entry upon such real estate, and the same remedy for such breach, by entry, suit, or otherwise, as the original grantor, or those who legally represent him, would have if still owning such reversion. G. S. 1888, § 1053.

In Massachusetts there seems to be a departure from the common law on this

point, for it was held in *Hayden v. Stoughton*, 5 Pick. 528, and *Brigham v. Shattuck*, 10 Pick. 305, that a testator, after creating an estate in fee upon condition, retained a "reversionary contingent estate" which would vest in the residuary devisee. And in *Austin v. Cambridgeport Parish*, 21 Pick. 215, where land had been conveyed by deed upon a condition, upon a breach after the grantor's decease the residuary devisee brought an action for the land and recovered. The point was taken that the grantor's interest was a mere possibility which could not be assigned or devised, and upon his death would descend in strict privity to the heir; but it was held that it was a "contingent possible estate," and therefore capable of being devised. 1 Am. Law. Rev. 265, 268, article by F. C. Loring, Esq.

New Jersey: *Southard v. Central R. Co.* 26 N. J. L. 13; *Cornelius v. Ivins*, 26 N. J. L. 376. Now assignable by Stat. of 1851.

<sup>2</sup> Co. Litt. 214 a; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; *Williams v. Jackson*, 5 Johns. 489; *Tinkham v. Erie R. Co.* 53 Barb. 393; *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455; *Rice v. Boston & W. R. Co.* 12 Allen, 141; *Guild v. Richards*, 16 Gray, 309, 318; *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657; *Hooper v. Cummings*, 45 Me. 359.

<sup>3</sup> *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455; *Guild v. Richards*, 16 Gray, 309.

grantor's estate is assigned under bankrupt or insolvent laws, he cannot afterwards maintain ejectment or a writ of entry to recover possession for a breach of a condition subsequent.<sup>1</sup>

The grantor's right of entry for a breach of condition cannot be taken in execution by his creditor.<sup>2</sup>

But it is held that the grantee in fee of land burdened with an easement granted upon condition may maintain an action to take advantage of a breach, or to enforce the performance of a condition upon which his grantor had conveyed the easement to a third person.<sup>3</sup>

730. There is ordinarily no necessity for a demand upon the grantee prior to the entry, or for a notice to him subsequently.<sup>4</sup> But the condition may be such that a demand or notice for its performance will be necessary. Thus, where the condition was that if the grantee should neglect or refuse to support a fence around the granted land the deed should be void, it was held that there was no forfeiture until the grantee had "neglected" or "refused" to support a fence, after notice or request, and had failed to do so after a reasonable time allowed for that purpose.<sup>5</sup> And where the condition was to pay certain legacies, and one of the legatees was absent from the State, before there could be a forfeiture by reason of the non-payment of the legacy to him a demand of payment was necessary.<sup>6</sup>

In Indiana a demand for performance is equivalent to an entry,<sup>7</sup> and a forfeiture cannot be claimed without such demand. If the grantee under a deed subject to a condition abandons the land without sufficient excuse, and without any offer to perform a continuous service imposed by the condition, no demand for performance is necessary to entitle the grantor to reënter. His abandon-

<sup>1</sup> *Stearns v. Harris*, 8 Allen, 597.

<sup>2</sup> *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657; *Leach v. Leach*, 10 Ind. 271.

<sup>3</sup> *Pinkum v. Eau Claire*, 81 Wis. 301, 309, 51 N. W. Rep. 550. Winslow, J., said: "It would be a singular rule of law which would forever prevent the owner in fee of lands from questioning the right of another to maintain an easement upon his land when there existed a violation of the express condition upon which the easement was granted."

<sup>4</sup> *Langley v. Chapin*, 134 Mass. 82; *Sanborn v. Woodman*, 5 Cush. 36; *Rowell v. Jewett*, 69 Me. 293; *Tallman v. Snow*, 35 Me. 342; *Whitton v. Whitton*, 38 N. H. 127; *Liebrand v. Otto*, 56 Cal. 242. Georgia: Code 1882, § 2297.

<sup>5</sup> *Merrifield v. Cobleigh*, 4 Cush. 178.

<sup>6</sup> *Bradstreet v. Clark*, 21 Pick. 389.

<sup>7</sup> *Ellis v. Elkhart Car Co.* 97 Ind. 247, 249; *Cory v. Cory*, 86 Ind. 567; *Clark v. Holton*, 57 Ind. 564; *Indianapolis, &c. R. W. Co. v. Hood*, 66 Ind. 580; *Risley v. McNiece*, 71 Ind. 434.

ing the land is equivalent to a renunciation of his rights under the deed, and is authority to the grantor to enter.<sup>1</sup>

But if the condition is one that depends upon the non-use of the property for a specified purpose for a time mentioned, there can be no demand for performance; for when the time has elapsed the breach of the condition is complete, and there is no breach until such time has elapsed.<sup>2</sup>

**731.** A court of equity will not declare a forfeiture; nor will it lend its aid in any way to enforce a forfeiture;<sup>3</sup> nor will a court of equity enforce specific performance of that, in a deed, the non-performance of which works a forfeiture of the estate.<sup>4</sup>

But a court of equity, when merely asked to enforce a condition as a covenant or agreement, may lend its aid to compel the party to abide by the covenant, and to this end may restrain a breach of a reasonable and legal condition by injunction. A court of equity will so interfere notwithstanding the fact that forfeiture is presented as the penalty of the breach. Thus, where a conveyance was made upon the express condition that intoxicating liquors should not be sold upon the granted land, with a provision that the property should revert to the grantor upon a breach of the condition, the condition was enforced by issuing a perpetual injunction against the carrying on of the business of dealing in intoxicating drinks on the land conveyed.<sup>5</sup>

<sup>1</sup> *Richter v. Richter*, 111 Ind. 456, 12 N. E. Rep. 698; *Ellis v. Elkhart Car Co.* 97 Ind. 247; *Lindsey v. Lindsey*, 45 Ind. 552; *Cory v. Cory*, 86 Ind. 567; *Schuff v. Ransom*, 79 Ind. 458; *Risley v. Mc-Niece*, 71 Ind. 434.

<sup>2</sup> *Ellis v. Elkhart Car Co.* 97 Ind. 247.

<sup>3</sup> 2 Story's Eq. Jur. § 1319; *Horsburg v. Baker*, 1 Pet. 232; *Warner v. Bennett*, 31 Conn. 468; *Smith v. Jewett*, 40 N. H. 530; *Douglas v. Union Mut. L. Ins. Co.* 127 Ill. 101, 20 N. E. Rep. 51; *Coffin v. Portland*, 16 Oreg. 77, 17 Pac. Rep. 580; *Raley v. Umatilla Co.* 15 Oreg. 172, 13 Pac. Rep. 890; *Stevens v. Pillsbury*, 57 Vt. 205, 52 Am. Rep. 121; *Erwin v. Hurd*, 13 Abb. N. C. 91; *Spaulding v. Hallenbeck*, 39 Barb. 79; *Livingston v. Stickles*, 8 Paige, 398, 402; *Livingston v. Tompkins*, 4 Johns. Ch. 415, per Chancellor Kent; *Memphis & C. R. Co. v.*

*Neighbors*, 51 Miss. 412, 418; *Towne v. Bowers*, 81 Mo. 491, 497; *Messersmith v. Messersmith*, 22 Mo. 369; *Michigan State Bank v. Hastings*, 1 Doug. 225, 41 Am. Dec. 549; *Michigan State Bank v. Hammond*, 1 Doug. (Mich.) 527; *Crane v. Dwyer*, 9 Mich. 350, 80 Am. Dec. 87; *White v. Port Huron, &c. R. Co.* 13 Mich. 356; *Wing v. Railey*, 14 Mich. 83; *Watrous v. Allen*, 57 Mich. 362, 24 N. W. Rep. 104, 58 Am. Rep. 363; *Chute v. Washburn*, 44 Minn. 312, 46 N. W. Rep. 555.

<sup>4</sup> *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. Rep. 4; *Woodruff v. Trenton Water Power Co.* 10 N. J. Eq. 489; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Erwin v. Hurd*, 13 Abb. N. C. 91; *Close v. Burlington, &c. Ry. Co.* 64 Iowa, 149, 19 N. W. Rep. 886.

<sup>5</sup> *Watrous v. Allen*, 57 Mich. 362, 24 N. W. Rep. 104, 58 Am. Rep. 363. See,

**732.** A court of equity will grant relief against a forfeiture of land for a condition broken when the breach is not gross and wilful, and the condition is for the payment of money or for doing something, the failure to do which is susceptible of a definite compensation in damages.<sup>1</sup>

But the jurisdiction in equity to grant relief against forfeiture is confined to cases which admit of compensation in damages. As said in an early case:<sup>2</sup> "The true ground of relief against penalties is from the original intent of the case, and the court gives the party all that he expected or desired; it is the recompense that gives the court a handle to grant relief." Where a mother conveyed land to her son upon an express condition that he should provide for her maintenance during her natural life, and the son, having maintained his mother many years, died without making any express provision for her by will or otherwise, but leaving ample means for her maintenance, which his representatives offered to apply to that purpose, it was held that if there was any breach of the condition it was a proper case for equitable relief against a forfeiture.<sup>3</sup>

Where land was conveyed to a railway company in consideration that it should erect and forever maintain on such tract a passenger depot and a freight depot, of a size and character suitable and sufficient for the transaction of its business and the accommodation of the public at that point, and to cause all passenger and freight trains to stop at such depots, respectively, so as to transact and perform all business that may be there offered, and it was expressly provided that upon a breach of the condition the land should revert to the grantors, it appeared that

also, *Clark v. Martin*, 49 Pa. St. 289; *Whitney v. Union Ry. Co.* 11 Gray, 359, 71 Am. Dec. 715.

<sup>1</sup> *Story's Eq. Jur.* §§ 1313-1323; *Pom. Eq. Jur.* § 381; *Rowell v. Jewett*, 69 Me. 293; *Marwick v. Andrews*, 25 Me. 525; *Spaulding v. Hallenbeck*, 39 Barb. 79, 86; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Henry v. Tupper*, 29 Vt. 358; *Carpenter v. Westcott*, 4 R. I. 225; *Hancock v. Carlton*, 6 Gray, 39; *Sanborn v. Woodman*, 5 Cush. 36; *Stevens v. Pillsbury*, 57 Vt. 205; *Rogan v. Walker*, 1 Wis. 527; *Ritchie v. Kansas, &c. Ry. Co.*

(*Kans.*) 39 Pac. Rep. 718, 724, *Allen, J.*, saying: "While the law enforces the lawful contracts of parties, and even gives effect to forfeitures, equity gives relief against the hardships incident to such forfeitures in very many cases."

In some English cases relief in equity has been given only upon the ground of accident, fraud, or surprise. *Hill v. Barclay*, 18 Ves. 56, 16 Ves. 402; *Reynolds v. Pitt*, 19 Ves. 134.

<sup>2</sup> *Peachy v. Somerset*, 1 Strange, 447.

<sup>3</sup> *Messersmith v. Messersmith*, 22 Mo. 369.

there was a substantial breach of the condition, for which a forfeiture was adjudged. It appeared also that the railway company took possession of the land conveyed, constructed a line of railroad across it, built side-tracks, depot buildings, roundhouse, stock-yards, water-tank, and other structures and conveniences for its accommodation thereon. The court therefore said that if the railway company elect to retain the land and improvements, they should be permitted to do so on payment of the value of the land, exclusive of improvements placed thereon by the company, measured as of the date of the commencement of this action, with interest from that date.<sup>1</sup>

<sup>1</sup> *Ritchie v. Kansas, &c. Ry. Co. (Kans.)* 39 Pac. Rep. 718, 724. "The estate granted was the bare land, and that estate, we think, reverts to the heirs of the grantor. The railroad tracks, roundhouse, depot buildings, etc., were not granted by the deed, but have been constructed by the grantee. The values of the various improvements made by the railroad company are not stated in the findings. The defendant, being a railway corporation, has a right to condemn these lands, or so much thereof as is necessary for its use, but, in case of such condemnation, would be required to make full payment therefor. In this case the defendants have not filed any pleading praying relief from the effects of the forfeiture; but as the plaintiffs allege an equitable estate, and as the rules of pleading in actions of this kind under the Code are extremely liberal, we do not feel at liberty to direct a judgment to be entered on the special findings, which would be inequitable." Per Allen, J. See, also, *Cohen v. St. Louis &c. R. Co.* 34 Kans. 158, 8 Pac. Rep. 138, 55 Am. Rep. 242.

## CHAPTER XXII.

### RESTRICTIONS AS TO THE USE OF LAND.

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| I. Restrictive conditions and covenants in general, §§ 733-749. | IV. When restrictive covenants run with the land, 784-801. |
| II. Particular restrictions and their construction, 750-770.    | V. Waiver and release of restrictions, 802-813.            |
| III. Who have the burden and benefit of restrictions, 771-783.  | VI. Enforcement of restrictions, 814-824.                  |

#### *I. Restrictive Conditions and Covenants in General.*

733. The owner of land, desiring to protect and improve the neighborhood for any special purpose, may impose such restrictions as he sees fit in making sales of his land, provided such restrictions are not against public policy, and a court of equity will generally enforce them.<sup>1</sup> He may determine for himself what kinds of business are undesirable in the vicinity of residences, and covenants restraining them can be enforced without any proof whatever that they are "injurious or offensive."<sup>2</sup>

<sup>1</sup> Rowland v. Miller, 139 N. Y. 93, 34 N. E. Rep. 765, 15 N. Y. Supp. 701; Trustees v. Lynch, 70 N. Y. 440; Trustees v. Thacher, 87 N. Y. 311; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. Rep. 335; Thompson's App. 101 Pa. St. 225; Sanborn v. Rice, 129 Mass. 387, 396; Whitney v. Union Ry. Co. 11 Gray, 359, 71 Am. Dec. 715; Peabody Heights Co. v. Willson (Md.), 32 Atl. Rep. 386; Newbold v. Peabody Heights Co. 70 Md. 493, 17 Atl. Rep. 372; Winnepesaukee Camp-Meeting Asso. v. Gordon, 63 N. H. 505, 3 Atl. Rep. 426; Webb v. Robbins, 77 Ala. 176; Morris v. Tuscaloosa Manuf. Co. 83 Ala. 565, 3 So. Rep. 689.

<sup>2</sup> Rowland v. Miller, 139 N. Y. 93, 34 N. E. Rep. 765, per Earl, J.; Condert v. Sayre, 46 N. J. Eq. 386, 19 Atl. Rep. 190.

In Whitney v. Railway Co. 11 Gray, 359-363, Mr. Justice Bigelow said: "Every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value, or diminish the pleasure of the enjoyment, of the land which he retains. The only restriction on this right is that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint of trade." To like effect in Condert v. Sayre, 46 N. J. Eq. 386, 19 Atl. Rep. 190, Van Fleet, V. C., said: "There can be no doubt that the dominion which the law gives every landowner over his land, who owns it in fee, invests him with good right and full power, when he conveys a part, to impose such



A covenant that a certain piece of land should not be built upon is not contrary to public policy.<sup>1</sup>

**734. Restrictions in the use of land conveyed in fee are not favored,** but the courts will enforce them where the intention of the parties in their creation was clear. "In this country real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed. Hence it is contrary to the well-recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use; and hence, in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee, all doubts should, as a general rule, be resolved in favor of a free use of property and against restrictions."<sup>2</sup>

By indenture between adjoining owners, one of them — who was the owner of two estates, on the first of which was a brick house, and on the second, which was in the rear of the first, was a wooden house — covenanted that he would permanently close up a door opening on the land of the other from the brick house, and put a window in its place, and further covenanted that he would permanently blind the lower part of the windows in the wooden house, which overlooked the adjoining owner's land. It was held that the covenantor or his grantees could not be restrained

limitations upon its use as will prevent his grantee, and those claiming under him, from making such use of the part conveyed as may impair or diminish the value of the part which he retains. . . . Covenants of this kind, which add either to the value or desirability of the land retained or conveyed, and which do not in any way impose an unreasonable restraint upon trade or industry, have, as I think an examination of the authorities clearly shows, uniformly been upheld and enforced."

In *Trustees v. Lynch*, 70 N. Y. 440, 446, Allen, J., said: "Covenants, conditions, and reservations imposing restrictions upon urban property, for the benefit of adjacent lands, having respect to light, air, ornamentation, or the exclusion of occupations which would render the entire

property unsuitable for the purposes to which it could be most advantageously devoted, have been sustained, and have never been regarded as impolitic. They have been enforced at law and in equity without question. The restrictions are deemed wise by the owners, who alone are interested, and they rest upon and withdraw from general and unrestricted use but a small portion of territory within the corporate limits of any city or municipality, and neither public or private interest can suffer."

<sup>1</sup> *Coles v. Sims*, 5 De G., M. & G. 1; *Rankin v. Huskisson*, 4 Sim. 13.

<sup>2</sup> *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. Rep. 556. And see *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. Rep. 687; *Peabody Heights Co. v. Willson* (Md.), 32 Atl. Rep. 386.

**RESTRICTIVE CONDITIONS AND COVENANTS IN GENERAL. [§§ 735, 736.]**

from opening windows in the wall of the brick house, towards the land of the adjoining owner, by implication from the covenants of the indenture concerning the windows of the wooden house.<sup>1</sup>

**735. Restrictions are to be fairly and reasonably interpreted according to their apparent purpose.** On the one hand they are not to be construed narrowly, and on the other hand they are not to be unduly enlarged.<sup>2</sup> They are to be interpreted according to the apparent purpose of protection or advantage intended by the parties. The primary rule of interpretation is to gather the intention of the parties from their words by reading, not simply a single clause of the agreement, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met.<sup>3</sup>

A restriction will not be extended by implication to some other matter not within the words of the provision. In a conveyance of land with a water-power, a restriction that it shall be used "for milling and manufacturing purposes only" does not require the grantee to erect a mill of any kind, or to use the water-power; nor does it prevent his erecting a steam-mill with buildings that are necessary incidents of a mill, such as a store and dwelling.<sup>4</sup>

The construction of a restriction is for the court, and evidence showing the meaning of the words used is not admissible unless the words are terms of art, or, by custom or usage at the place where the land is situated, the words have a local meaning.<sup>5</sup>

**736. A restriction which amounts to a prohibition of the use of the land granted is void.** The use of the land may be restricted by a covenant or condition creating a general scheme of improvement, or by a covenant, condition, exception, or reservation creating an easement in favor of the grantor. But a mere prohibi-

<sup>1</sup> *Christ Church v. Lavezzolo*, 156 Mass. 89, 30 N. E. Rep. 471.

<sup>2</sup> *Smith v. Bradley*, 154 Mass. 227, 28 N. E. Rep. 14, citing *Jeffries v. Jeffries*, 117 Mass. 184; *Sanborn v. Rice*, 129 Mass. 387; *Whitney v. Union Railway*, 11 Gray, 359.

<sup>3</sup> *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. Rep. 275, per Vann, J., affirming 1

N. Y. Supp. 132, and citing *Quackenboss v. Lansing*, 6 Johns. 49; *Duryea v. Mayor*, 62 N. Y. 592, 597; *Western N. Y. L. Ins. Co. v. Clinton*, 66 N. Y. 326; *Platt, Cov.* 136.

<sup>4</sup> *Madore's App.* 129 Pa. St. 15, 17 Atl. Rep. 804.

<sup>5</sup> *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. Rep. 556.

tion in an absolute conveyance, which saves no rights to the grantor or to purchasers from him, is void. In a conveyance of land on both sides of a stream with a mill, there was a clause "excepting and prohibiting the right of using the waters of the stream for turning any wheel not used or useful in fulling, dyeing, or dressing cloth." No right to the use of the water was saved to the grantor. This clause did not create a condition, because there were no words which, *ex vi termini*, imported that the vesting or continuance of the estate was to depend upon the observance of the stipulation. It is clear that the clause could not be construed as a covenant; for there were no words which, upon any construction, could be held to import a covenant. The restriction was in effect a prohibition of the use of the thing granted, and was therefore void.<sup>1</sup>

737. Where a restriction is confined within reasonable bounds, and the party in whose favor it is made has an interest in the subject-matter of the restriction, or others in privity with him have such an interest, it will be sustained.<sup>2</sup> "It must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all lands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed."<sup>3</sup>

A covenant by a grantor, that neither he nor his assigns will sell any marl from his land adjoining the land conveyed, will not be enforced against a purchaser from him of the land intended

<sup>1</sup> Craig v. Wells, 11 N. Y. 315.

<sup>3</sup> Keppell v. Bailey, 2 Myl. & K. 517,

<sup>2</sup> Grigg v. Landis, 21 N. J. Eq. 494, 535, per Brougham, L. C.  
502, per Scudder, J.

to be burdened by such covenant. If such a covenant could be enforced, the courts could not refuse to execute any covenant which has for its purpose any conceivable restriction upon the free use and enjoyment of lands. Such a covenant is also void as being in general restraint of trade.<sup>1</sup>

Restrictive covenants, though unlimited as to time, are not void as transgressing the doctrine of perpetuity, any more than an unlimited right of way or other easement is void for that reason. Restrictions are not estates in land, or even an equitable interest in land.<sup>2</sup> But a covenant that is not really restrictive, but is one to do an act which creates such an interest, may be void as tending to create a perpetuity.<sup>3</sup>

**738. A covenant not to engage in a particular business upon the land conveyed or retained is valid if limited to a reasonable time.** A restriction in a conveyance, that the property shall not be used for hotel purposes for two years, is not invalid as imposing an unreasonable restraint of trade.<sup>4</sup> A covenant not to carry on a particular trade or business is binding upon an assignee with notice.<sup>5</sup>

A person doing business as a private banker commenced the erection of a banking-house on land he owned in the town where he conducted his business. Before the building was finished, he agreed to sell the building and lot by a contract which stated that the purchaser's object in making the purchase was to form a banking corporation, and then convey to it such property. The vendor agreed that when the corporation commenced business he would withdraw from business, and not reëngage in business as a private banker in the borough at any time within ten years thereafter. He also agreed that his covenant to withdraw and abstain from business should run with the land he had agreed to convey, and that in case he broke it the owner of the land at the time the breach was committed should have a right to maintain an action at law against him for its breach. After the property had been conveyed to the bank the vendor violated his covenant, and the bank sued him. The vendor demurred to the declaration

<sup>1</sup> *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679.

<sup>2</sup> *Keppell v. Bailey*, 2 Mylne & K. 517; *Catt v. Tourle*, L. R. 4 Ch. 654.

<sup>3</sup> *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562.

<sup>4</sup> *Mollyneaux v. Wittenberg*, 39 Neb. 547, 58 N. W. Rep. 205.

<sup>5</sup> *Parker v. Whyte*, 1 H. & M. 167.

filed in the case, and the question thus presented was, whether the covenant was so annexed to the land as to pass with its title, and confer upon the holder of the title a right to maintain an action at law for its breach; and it was held that the covenant ran with the land.<sup>1</sup>

**739.** It is competent for the grantee to covenant to reconvey the land for a specified sum within a period named.<sup>2</sup> But a covenant by the grantee of land that the grantor "shall at any time have the right of preëmption of the premises conveyed," at a price named, does not entitle the grantor to a reconveyance at any time on tendering that sum, but merely gives him the right to buy it in preference to any one else, whenever the grantee is willing to sell at that price.<sup>3</sup>

**740.** A provision that the grantee shall not convey without the consent of the grantor is repugnant to the grant and void.<sup>4</sup> A covenant in a deed not to convey or lease land to a Chinaman is void, as contrary to the public policy of the government, in contravention of its treaty with China, and in violation of the Fourteenth Amendment of the Constitution, and is not enforceable in equity.<sup>5</sup>

**741.** Restrictions in regard to the use and enjoyment of the land conveyed are not usually conditions. Thus, in a deed of a lot of land, an express stipulation that a dwelling-house should be erected on the premises within a specified time and at a specified cost does not constitute a condition for the breach of which the estate would be forfeited.<sup>6</sup> Nor does a covenant that the land conveyed shall be used only for a specified purpose create a condition.<sup>7</sup>

In a deed of a lot of land in a block, a provision that the house to be built upon it shall be set back a certain distance, for the benefit of the other lots, not in the form of a condition and without any provision for forfeiture, is not a condition, but simply a

<sup>1</sup> *National Bank v. Segur*, 39 N. J. L. 173.

<sup>2</sup> See § 669; *Randall v. Sanders*, 87 N. Y. 578.

<sup>3</sup> *Garcia v. Callender*, 125 N. Y. 307, 26 N. E. Rep. 283, affirming 5 N. Y. Supp. 934, 23 N. Y. St. Rep. 1002.

<sup>4</sup> § 662. *Murray v. Green*, 64 Cal. 363, 28 Pac. Rep. 118.

<sup>5</sup> *Gandolfo v. Hartman*, 49 Fed. Rep. 181.

<sup>6</sup> *Stone v. Houghton*, 139 Mass. 175, 31 N. E. Rep. 719. See, also, *Rawson v. School Dist.*, 7 Allen, 125; *Ayer v. Emery*, 14 Allen, 67; *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Barker v. Barrows*, 138 Mass. 578.

<sup>7</sup> *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. Rep. 655, affirming 41 Hun, 643.

limitation upon the use of the property. Although the grantor calls the limitation a reservation it is not strictly such, because it is not an easement created for his own use out of the property granted.<sup>1</sup>

**742. Restrictions as to the use of the land or the mode of its enjoyment,** though expressed to be "conditions," will not be construed to be technical conditions unless it appears that the parties so intended or understood them to be "conditions," a breach of which would work a forfeiture of the estate.<sup>2</sup> Thus "conditions" that "no dwelling-house or other building, except necessary outbuildings, shall be erected or placed on the rear of the said lot," and that "no buildings which may be erected on the said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other materials than brick, stone, or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house for the term of twenty years" from a certain day, are to be construed as restrictions imposed as a part of the general scheme of improvement, and not as "conditions."<sup>3</sup>

A proviso in a deed by one owning adjoining lots, that the roof of a stable shall never be raised higher than a certain number of feet above the street, is a restriction for the benefit of the other lots, and not a condition. That the restriction was introduced by the technical word "provided" did not make it a condition.<sup>4</sup>

**743. A restriction in the form of a common-law condition may be enforced by forfeiture** if there is nothing in the context of the deed which warrants any other than the ordinary meaning of the technical words of condition employed, and nothing in the attending circumstances showing that the parties did not intend that the words employed should have their ordinary meaning.<sup>5</sup> Wherever the terms of the instrument are plain and

<sup>1</sup> *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. Rep. 687.

<sup>2</sup> *Ayling v. Kramer*, 133 Mass. 12; *Skinner v. Shepard*, 130 Mass. 180; *Kennedy v. Owen*, 136 Mass. 199, 201; *Parker v. Nightingale*, 6 Allen, 341; *Jeffries v. Jeffries*, 117 Mass. 184; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Tobey v. Moore*, 130 Mass. 448; *Fuller v. Arms*, 45 Vt. 400; *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. Rep. 77; *Southard v. Central R. Co.* 26 N. J. L. 13; *Clark v. Martin*, 49 Pa. St. 289, 10 Am. L. Reg. 479.

<sup>3</sup> *Ayling v. Kramer*, 133 Mass. 12.

<sup>4</sup> *Jeffries v. Jeffries*, 117 Mass. 184. And see *Fuller v. Ames*, 45 Vt. 400.

<sup>5</sup> *Adams v. Valentine*, 33 Fed. Rep. 1; *Dana v. Wentworth*, 111 Mass. 291; *Allen v. Howe*, 105 Mass. 241; *Gray v.*

unambiguous, there is no hesitation in enforcing the actual contract made by the parties.<sup>1</sup>

There is jurisdiction in equity to enforce a restriction though it be in the form of a strict condition. A violation of the restriction may be enjoined.<sup>2</sup>

A condition as to the use to be made of land is not a common-law condition when the deed expressly provides that a breach of such condition shall not work a forfeiture of the estate, but shall only give the grantor, his heirs and assigns, the right to enter and abate the nuisance provided against.<sup>3</sup>

**744. An agreement restricting the use of the land conveyed may be proved by parol.** The office of a deed is not to express the terms of the contract of sale, but to pass the title pursuant to the contract. An agreement which was a part of the consideration for the sale, restricting the use of the property, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parol evidence to prove such an agreement is no infringement of the rule that parol evidence is not admissible to contradict, vary, or explain a written instrument. Thus evidence is admissible of a parol agreement that no part of the property should be used for the sale of intoxicating liquors, and upon proof of the agreement the grantee may be restrained from using the property for such purpose.<sup>4</sup>

An agreement not to use certain land conveyed, for a particular purpose, is not an agreement for the sale of an interest in or concerning such land, which is void under the statute of frauds if not in writing.<sup>5</sup>

Blanchard, 8 Pick. 283; McKissick v. Pickle, 16 Pa. St. 140; McKelway v. Seymour, 29 N. J. L. 321; Sperry v. Pond, 5 Ohio, 387, 24 Am. Dec. 296; Dolan v. Baltimore, 4 Gill, 394; Gibert v. Peteler, 38 N. Y. 165; Doorley v. McConnell, 78 Hun, 580, 29 N. Y. Supp. 500; Rose v. Hawley, 118 N. Y. 502, 23 N. E. Rep. 904.

<sup>1</sup> Mills v. Seattle & M. Ry. Co. 10 Wash. 520, 39 Pac. Rep. 246.

<sup>2</sup> Barrett v. Blagrove, 5 Ves. 555; Coles v. Sims, Kay, 56; Hubbell v. Warren, 8 Allen, 173; Watrous v. Allen, 57 Mich. 362, 24 N. W. Rep. 104, 58 Am. Rep. 363; Clark v. Martin, 49 Pa. St. 289.

<sup>3</sup> Tobey v. Moore, 130 Mass. 448.

<sup>4</sup> Hall v. Solomon, 61 Conn. 476, 23 Atl. Rep. 876, 29 Am. St. Rep. 218. The language of Carpenter, J., is used in part in the above statement. Collins v. Tilling, 26 Conn. 368; Pierce v. Woodward, 6 Pick. 206; Willis v. Hulbert, 117 Mass. 151; Tallmadge v. East River Bank, 26 N. Y. 105; Knapp v. Hall, 20 N. Y. Supp. 42, 17 N. Y. Supp. 437.

<sup>5</sup> Hall v. Solomon, 61 Conn. 476, 23 Atl. Rep. 876, 29 Am. St. Rep. 218; Boswick v. Leach, 3 Day, 476, followed. In that case, decided in 1809, the court said: "The agreement not to use his mill after a certain day is not within the statute of

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**745.** A parol restriction is not binding upon a subsequent purchaser unless he has notice of the agreement, but it will bind a subsequent purchaser who has actual or constructive notice of it.<sup>1</sup> Thus, where the owner of lots on both sides of a street in a city made a plan which showed the street as widened eight feet on each side, and exhibited this to purchasers of lots, who were told that buildings to be erected on the lots should stand back eight feet from the street line, it was held that subsequent purchasers of lots with constructive notice of the restriction were bound by it. "It is to be presumed that, relying upon this assurance, they paid a larger price for the lots than otherwise they would have paid."<sup>2</sup>

**746.** A grantor's parol promise to one purchaser to impose restrictions is not binding upon another purchaser who had no knowledge of such promise when he took his title. Thus, where a plat-owner sells lots to sundry grantees on oral representations that all the lots in the plat will be sold subject to restrictions that no building shall be erected within fifteen feet of the street line, and the deed for each lot sold restricts such limitation to the lot therein conveyed, and afterwards the plat-owner sells the only remaining two lots without restrictions to a grantee who has no notice of the oral agreement with the other grantees, such grantee cannot be enjoined from building within fifteen feet of the street line by a lot-owner whose complaint fails to show that plaintiff was influenced in purchasing his lot by his grantor's parol promise to him.<sup>3</sup>

**747.** A restrictive covenant will not be implied unless such appears to be the presumed intention of the parties, or it ap-

frauds and perjuries; for this statute contemplates only a transfer of lands, or some interest in them."

Nor is it an agreement not to be performed within one year, under another clause of the statute. It has been pretty uniformly held that contracts which may be performed within one year are not within the statute. *Peters v. Westborough*, 19 Pick. 364; *Roberts v. Rockbottom Co.* 7 Metc. 46; *Lyon v. King*, 11 Metc. 411; *Doyle v. Dixon*, 97 Mass. 208.

<sup>1</sup> *Tallmadge v. East River Bank*, 26 N. Y. 105; *Hayward Homestead Asso. v.*

*Miller*, 26 N. Y. Supp. 1091, 6 Misc. Rep. 254.

<sup>2</sup> *Tallmadge v. East River Bank*, 26 N. Y. 105, 109, per Sutherland, J.

<sup>3</sup> *Knapp v. Hall*, 17 N. Y. Supp. 437. In the case of *Tallmadge v. Bank*, 26 N. Y. 105, which goes as far if not farther than any other case to sustain the respondent's contention, the grantee had ample notice, when he took title, of the restrictions upon his premises, and the plaintiff took his title upon assurances that the restrictions were imposed upon the defendant's land.



pears that the grantor intended to impose such restriction for the benefit of his own land or the land conveyed, though not embraced within the words of his deed, and that the grantee accepted the deed with the intention of taking the benefit, and the burden as well, of the implied restriction. A deed of a portion of a large estate referred to a map of it of a certain date, as filed in the register's office. No map of that date was ever filed; but after the execution of the deed a map was made and filed, by which the land composing that estate was entirely changed in its arrangement and division from the arrangement and division originally made and appearing on the map referred to. These changes consisted in laying out new roads where none appeared on that map, and also in subdividing the tracts laid down on the map, and thus reducing their size. The purchaser complained that in consequence of these changes, and subsequent conveyances made in conformity to them, the character of the whole neighborhood had been completely changed, and that then, after a lapse of more than twenty years, instead of the estate being divided into tracts or plats suitable for gentlemen's country residences, it was divided into small lots, upon many of which dwellings had been erected, and also that, instead of the land being an open country, with here and there a large and handsome dwelling, surrounded by beautiful grounds, as it was laid out on the map referred to, it had become a populous village. These alterations in the arrangement and division of the land composing the estate, and the changes which in consequence had taken place, both in the manner in which the land was used and in the character of its occupants, the purchaser claimed had absolved him from all duty to keep his covenant to erect no more than one dwelling on the four acres purchased by him, and that he was consequently entitled to a judicial declaration that such restriction is without force. The purchaser claimed that his grantor, by referring in the deed of the four acres to the map then existing, made the map a part of the deed, and that when the deed and map were read together it must be seen that one of the promises made by implication to the purchaser was that the arrangement and division of the estate should remain unchanged. "It cannot be disputed," say the court, "that where the owner of a tract of land cuts it up or divides it in such manner as to give one part an additional value because of rights which, under the division, are given to it in the

other part, and then causes a map or plan of his division showing such rights to be made, and afterwards makes sale, by the map or plan, of the part increased in value by rights given to it in the other part, and the part sold is subsequently conveyed by a deed which describes the land by reference to the map or plan, that such rights will pass to the grantee although no express grant is made." It was accordingly held that the purchaser had no right to understand that the grantor would adhere to the plan and division of the estate indicated by the map referred to, because the very land the grantee was purchasing was a part of a larger tract of seven acres laid down on that map, so that the map, instead of indicating an intention on the part of his grantor to abide by the scheme of division laid down on that map, evinced, on the contrary, a purpose to depart so radically from it as to give the complainant notice that he would not in his future conveyances regard it. The purchaser had no right to understand or believe that his grantor would in his future conveyances abide by a plan of division which he had utterly disregarded in his conveyance to him.<sup>1</sup>

748. A plan showing a building scheme is binding as a representation of the scheme upon the grantor who sells according to it. A building estate was offered for sale by auction in lots as a residential property, according to a plan and particulars of sale. This plan showed a private road terminating in a public road, where there was a gate. On one side of the private road were shown large residential lots; and on the other side smaller lots, called "stable lots," to go with the residential lots. At the gate was shown a piece of land with a lodge on it, marked "lodge" on the plan. Each purchaser of a residential lot and a stable plat covenanted to build one dwelling-house only of a certain value on such lot. Afterwards the piece of land marked "lodge" was sold to a purchaser who commenced building cottages on it. In a suit by a purchaser of a residential lot to enjoin the use of the land for any other purpose than a lodge and garden, it was held that an injunction should be granted. North, Justice, delivering judgment, said: "The lodge and its garden were devoted, by the existing scheme, to the purpose of a lodge and garden. And though I quite agree in the suggestion made that the marquis [the grantor] never entered into

<sup>1</sup> *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. Rep. 190.

any covenant to keep them up, or to have them used in that way, — that is to say, he never agreed to have a lodge-keeper there to open the gate, — yet, in my opinion, it would have been impossible for him, having regard to the general scheme held out by the plans, to have pulled down the lodge and covered the ground with cottages, or to have done anything of that sort.”<sup>1</sup>

An intending purchaser, who is shown a plan of a building estate upon which lots are laid out, of even size, on each of which the ground-plan of the house without any other building is delineated, is not entitled to assume that the whole estate is governed by a building scheme that each lot, without variation, shall be built on strictly in accordance with the plan, and therefore he has no remedy against one of the grantors who afterwards built a house upon one of the lots, and also a conservatory and stable as adjuncts to his house.<sup>2</sup>

749. A mere reference to a plan in describing a lot of land does not import a stipulation that the plan shall not be changed, and the lots used for purposes other than those indicated upon the plan, in the absence of any stipulation that the plan shall not be changed. Thus the fact that a portion of the land on a plan is designated as a public square does not give the purchaser of another portion of the land any easement or other interest in the square.<sup>3</sup> Thus, too, the fact that part of the land is marked upon the plan as a church lot does not give the purchasers of other lots an easement by virtue of which they can prevent the use of such lot for any other purpose.<sup>4</sup>

## II. *Particular Restrictions and their Construction.*

750. A restriction against the erection of any buildings other than dwellings with necessary outbuildings, such dwellings to cost not less than a certain sum, is violated by placing a tent on the lot, costing less than that sum, and used by the grantee and his family as a dwelling in the summer time, though they did not sleep in it.<sup>5</sup> Such a covenant is clearly violated by the erection of a church.<sup>6</sup>

<sup>1</sup> Tindall v. Castle, 62 L. J. Ch. 555.

<sup>2</sup> Tucker v. Vowles (1893), 1 Ch. 195.

<sup>3</sup> Coolidge v. Dexter, 129 Mass. 167.

<sup>4</sup> Chapman v. Gordon, 29 Ga. 250.

<sup>5</sup> Blakemore v. Stanley, 159 Mass. 6,

33 N. E. Rep. 689. As to a limitation of time in such a restriction, see Keening v. Ayling, 126 Mass. 404.

<sup>6</sup> St. Andrew's Church's App. 67 Pa.

St. 512.

PARTICULAR RESTRICTIONS AND THEIR CONSTRUCTION. [§ 751.

A provision that no buildings should be erected on the land except dwelling-houses is violated by the conversion of a dwelling-house erected in compliance with the provision into a public eating-house.<sup>1</sup>

A stable is not a necessary outbuilding upon a lot having no dwelling-house, under a restriction against buildings other than dwellings with necessary outbuildings.<sup>2</sup>

A covenant that any building upon the land shall be used only as a dwelling-house, and shall be of a certain height and have a stuccoed front and slated roof, does not prohibit an advertisement hoarding or bill-board. The meaning of the covenant seems to be this, that if you erect a building, such as a house, it must be a house of a certain character. It does not relate to anything which cannot have a front or a roof. The structure referred to is not a building within the meaning of the covenant.<sup>3</sup>

**751.** A covenant to erect only a single dwelling on a lot in a city block does not prohibit the erection thereon of an apartment house designed for the use of several families.<sup>4</sup> The court, by Mr. Justice Craig, said: "We think the parties intended by the use of the words in the deed the same as if they had said in the deed only one dwelling-house should be erected on each fifty-foot lot. No doubt the grantor had in mind, and desired to prohibit, the erection of several small dwellings on each fifty-foot lot; the intention being to require the erection of large structures on the property. It was also no doubt the intention of the grantor to require the property to be used for residence purposes. Under the clause in the deed, stores, livery stables, warehouses, houses for manufacturing purposes, could not be erected; nothing but dwelling-houses. At the time this deed was executed, flats or apartment houses where several families could reside were common; such buildings had been erected, and were then in use, within a short distance of these lots. If, therefore, it was the intention to prohibit the erection of a flat on the property, why did not the parties say so in the deed? or, if they intended that only a building such as is usually built for a private residence of a family should be erected, why not say that in the deed?"

<sup>1</sup> *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632.

<sup>2</sup> *Foster v. Fraser* (1893), 3 Ch. 158.

<sup>4</sup> *Hutchinson v. Ulrich*, 145 Ill. 336, 343,

<sup>3</sup> *Blakemore v. Stanley*, 159 Mass. 6, 34 N. E. Rep. 556.  
33 N. E. Rep. 629.

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Where, however, a deed containing a provision that only a single house should be erected on each lot, contained also a recital which tended to show that only a residence for a single family was contemplated by the restriction, this was accordingly construed as prohibiting the erection of a building for more than one family, though it would not prevent the covering of the whole lot with a building for that purpose.<sup>1</sup>

**752. A covenant by a grantor that he will not build on a certain portion of his remaining land, the object of the covenant being to secure to the grantee an unobstructed view of the ocean from his land, is violated by raising bath-houses and pavilions on the land at the time of the conveyance higher than they were at that time.<sup>2</sup> In a similar covenant by a grantee, in a deed of land bordering on a bluff of the ocean, there was a proviso that the grantee might nevertheless erect any bough-house on the margin of the ocean bank of the lot, or any bath-house at the foot of the bank. It was held that the construction of a pavilion along the entire ocean front of the lot, though of no greater height than a bough-house, was a violation of the covenant, both from its extent and its obstruction of the view.<sup>3</sup>**

A covenant that an open space or garden shall be kept unbuilt upon was held not to be violated by excavating the ground and building a covered urinal, the roof of which projected very slightly, if at all, above the surface of the garden. The object of the covenant was declared to be to keep the space open for the free access of light and air, and this object was not interfered with by the proposed structure beneath the surface.<sup>4</sup>

**753. An agreement among adjacent lot-owners to reserve an open space in front of their lots is a conveyance, and must be executed and acknowledged as such to entitle it to be recorded. When executed by a married woman it must be acknowledged by her in the manner provided by statute for acknowledgments of conveyances by married women; and a defective acknowledgment of a married woman of such agreement prevents its recording being considered as notice to her subsequent grantee, though his attorney found such agreement in searching the title.<sup>5</sup>**

<sup>1</sup> *Gillis v. Bailey*, 21 N. H. 149.

<sup>3</sup> *Gawtry v. Leland*, 31 N. J. Eq. 385.

<sup>2</sup> *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. Rep. 961; *Buck v. Backarack*, 45 N. J. Eq. 557, 17 Atl. Rep. 548.

<sup>4</sup> *Graham v. Newcastle-upon-Tyne*, 67 L. T. Rep. N. S. 790.

<sup>5</sup> *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. Rep. 1079.

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**754. A covenant not to erect any building on land conveyed as a public square is not violated by erecting a statue upon a pedestal.** In a sale of land to a city for a public square, a restriction that no part of it shall be used for any sort of buildings thereon is not violated by the erection of a monument consisting of a statue upon a pedestal. "A monument may take the shape of a memorial hall or other building, but that is not the general sense of the word, and will not be presumed. A statue upon a pedestal, even though the latter be large, is not a building in the popular meaning of the term, and in no proper sense can it be said to interfere with the devotion of the ground to public use as an open green and walk. On the contrary, the consensus of art and taste over the civilized world is that the green of public parks is the most appropriate place for national monuments of this kind." <sup>1</sup>

**755. A covenant not to erect any building "without the consent in writing of the grantor, his heirs or assigns,"** requires only the consent of the grantor, or of the owner for the time being of his estate, and not the consent of all the purchasers and lessees who may have acquired any part of the grantor's estate after the date of the conveyance containing such covenant. "At the date of the conveyance in question a considerable part of the estate had been built over and numerous houses erected, and leases or conveyances of those houses executed by the owner of the estate. It could not have been intended that the word 'assigns' should refer to or include these lessees or purchasers; and, indeed, I do not understand that that is contended for. It is said, however, that any subsequent lessee or purchaser of a plat is an assign, within the meaning of the term as used in the covenant, and that his consent in writing is necessary. But it would be very curious if this were so,—that the consent of every subsequent lessee or purchaser of a plat would have to be obtained, though the previous lessees or purchasers of plats need not be consulted at all." <sup>2</sup>

**756. A restriction that the front line of a building shall be set back from the street a certain distance is a valid restriction.**<sup>3</sup>

<sup>1</sup> Society of Cincinnati's Appeal, 154 Pa. St. 621, 635, 26 Atl. Rep. 647, per Mitchell, J.

<sup>2</sup> Everett v. Remington (1892), 3 Ch. 148, 158, per Romer, J.

<sup>3</sup> Hamlen v. Werner, 144 Mass. 396, 11 613

Such a restriction is violated by building a rectangular addition to the front, eight or nine feet wide, and projecting three feet or more over such space, though such addition does not begin at the ground, but four feet above it, and thence extends to the top of the building.<sup>1</sup>

Under such a restriction the purchaser built a house on his land, the front wall of which was set back the proper distance from the street, and in front of the house built a structure three and one half feet high, extending from the wall of the house to the line of the street, the top of which was covered by turf, and the interior used for coal-bins. All the reserved spaces in front of the other houses on the street were filled to a height of three or four inches from the line of the sidewalk, and sloped upward to a line at the house of nine to twelve inches, to prevent water from running towards the building. It was held that the structure built by the defendant upon his lot was a violation of the restrictions in the deed.<sup>2</sup>

A covenant not to erect any building within a certain distance from a street is violated by the erection of a wall fifteen feet high at right angles to the street and extending quite up to it.<sup>3</sup>

A restriction that no building shall be erected within ten feet of the street is not violated by the erection of a brick wall six feet in height, with a coping one foot in height, to be used as a fence or wall on the line of the street.<sup>4</sup>

**757.** A restriction requiring the setting back of a building a certain distance from the street prohibits a basement story surmounted by a balcony within that distance, especially if the restriction in terms prohibits any "projection in the nature of a bay window, circular or octagon front, with the foundation wall

N. E. Rep. 684; *Payson v. Burnham*, 141 Mass. 547, 6 N. E. Rep. 708; *Bagnall v. Davies*, 140 Mass. 76, 2 N. E. Rep. 786; *Peck v. Conway*, 119 Mass. 546; *Linzee v. Mixer*, 101 Mass. 512.

<sup>1</sup> *Sanborn v. Rice*, 129 Mass. 387. "We cannot regard this addition as an ordinary projection, or variation of detail in the arrangement and ornamentation of the front of the house, which the parties to the deed may have contemplated as being proper under the provisions of the deed.

The addition is in substance and effect a removal of the front line of the house three feet and three inches nearer to the street than the deed permits." Per Soule, J. See, also, *Linzee v. Mixer*, 101 Mass. 512; *Payson v. Burnham*, 141 Mass. 547, 6 N. E. Rep. 708.

<sup>2</sup> *Attorney-General v. Gardiner*, 117 Mass. 492.

<sup>3</sup> *Child v. Douglas, Kay*, 560.

<sup>4</sup> *Nowell v. Boston Academy*, 130 Mass. 209.

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sustaining the same," although within this reserved space "steps, windows, porticoes, and other usual projections appurtenant to said front wall are to be allowed," subject to certain limitations. Such a basement projection is not to be deemed a usual projection, within the meaning of such provision, when it is found that such a projection has never been usual in this country, though usual in European architecture, and well known to cultivated architects, and a natural incident, but not a necessary feature, of a building of the class to which the building in question belongs.<sup>1</sup>

But under such a restriction a stone porch added to a front corner of a building erected on the land and set back as required, fifteen feet high, with a steep slate roof seven feet high, and with solid side walls projecting at right angles to the front wall, and not extending more than five feet into and upon such reserved space, its walls and foundations being distinct from the front wall and its foundation, is a "portico" or "other projection," within the meaning of such deed, and not a "projection in the nature of a bay window, circular front, or octagon front."<sup>2</sup>

**758. Bay windows are part of a house, and cannot be extended over restricted ground.**<sup>3</sup> "When you find that parts of the main structure of the house, that is, the portions of the house forming the bays, are carried up from the foundation, it appears to me clear that such parts are buildings within the meaning of the covenant."<sup>4</sup>

**759. A projection in the nature of a bay window, circular or octagon front, with the foundation walls, was prohibited in a**

<sup>1</sup> Attorney-General v. Algonquin Club, 153 Mass. 447, 27 N. E. Rep. 2. And see *Linzee v. Mixer*, 101 Mass. 512.

<sup>2</sup> Attorney-General v. Ayer, 148 Mass. 584, 587, 20 N. E. Rep. 451. Holmes, J., said: "The parties to this deed did not mean by portico 'a walk covered with a roof, supported by columns at least on one side.' They meant the shelter to the door of a building, familiar to Massachusetts and to Boston. We are of opinion that they used it as a generic word, including a shelter with closed sides, as well as one with pillars. We agree that in determining the scope of the word we must look at the object of the restrictions and of the exceptions to it. But, as we have said,

the permission extends to more serious structures, with closed sides, and therefore there is no reason for excluding porches. Indeed, a portico projecting not more than five feet would, or at least might, obstruct the view of a neighboring house with its pillars almost as completely as if its sides were closed."

<sup>3</sup> Attorney-General v. Williams, 140 Mass. 329, 2 N. E. Rep. 80, 3 N. E. Rep. 214; *Sanborn v. Rice*, 129 Mass. 387, 395; *Payson v. Burnham*, 141 Mass. 547, 6 N. E. Rep. 708; *Manners v. Johnson*, 1 Ch. Div. 673.

<sup>4</sup> *Manners v. Johnson*, 1 Ch. Div. 673, 678, per Hall, V. C.



deed requiring the setting back of any building twenty feet from the street, unless any horizontal section of such projection would fall within the external lines of a trapezoid, whose base along the building should not exceed seven tenths of the length of the building, and whose side lines should make an angle of forty-five degrees with the base. It was held that the deed did not warrant the building of two or more bay windows close together, so that the bases of their respective trapezoids would interlap, and the length of the base of each, taken together, would be greater, while the part of the bases of each which did not overlap would be less, than the distance limited in the deed. The general purpose of the provision was to secure a space of twenty feet from the street which should be substantially free from buildings. "Certain projections into this space were allowed, but great pains were taken to limit the amount and character of them. If the front of the building is so wide as to admit of the erection of more than one such bay window, to allow the bases of the trapezoids of the several bay windows to overlap each other would be to allow the reserved space to be substantially occupied, instead of keeping it substantially clear. The privilege which is given by the deed of occupying a moderate portion of the reserved space with projections is not to be exercised in such a manner as to defeat the main purpose of the provision."

But under the same deed which expressly allowed "porticoes and other usual projections" without restriction, inasmuch as for a long time all parties have assumed that it was not intended to prohibit the building of porticoes close to bay windows, and octagon and circular fronts, it was held that such projections may be built without regard to whether the base of their trapezoids overlap the porticoes and other usual projections.<sup>1</sup>

A decree ordering the Algonquin Club to remove certain projections of its house, "with the foundation walls sustaining the same," "so that the entire space . . . shall be on the same face as the main front wall," was held not to require the foundations under ground to be removed.<sup>2</sup>

**760.** A piazza or porch is ordinarily a constituent part of a building, and is within the terms of a restriction which prohibits the placing of a building less than a certain number of feet

<sup>1</sup> Attorney-General v. Algonquin Club, 153 Mass. 447, 451, 27 N. E. Rep. 2.

<sup>2</sup> Attorney-General v. Algonquin Club, 155 Mass. 128, 29 N. E. Rep. 209.

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from the line of a street. Thus a piazza eight feet wide, within the prohibited distance, encircled by a railing, and having a roof supported by posts, attached to a house, and extending along its entire front, is within such a prohibition.<sup>1</sup> In another case a piazza, covered by a continuation of the roof of the building, extended within the prohibited distance. The posts which supported the projecting portion of the second story were six inches in diameter, and supported by brick piers resting on the ground. In the roof was a projecting dormer window, by means of which a portion of a room in the second story was also carried within the prohibited distance from the street. It was held that these projections were a violation of the restriction.<sup>2</sup>

An open porch may be a constituent part of a dwelling, if it is built on brick or stone foundations and is permanently attached to a building. It is a violation of a restriction against the erection of any building within a certain distance from the line of a street.<sup>3</sup>

**761. Uniform front line.**— A restriction that the front line of all buildings shall be placed equidistant from, and not less than eight feet back from, the street does not require the purchaser to put the front of his building back to the uniform line of the fronts of the adjoining houses already erected, which are more than eight feet from the street. If the buildings already erected are not upon a uniform line, there would be no means of fixing any other line than a line eight feet from the street.<sup>4</sup>

A restriction, that any building on the land conveyed should be set back from the street the same distance as a house then standing on an adjoining lot, only requires that the front wall of each building erected on the land shall conform, in respect to distance from the street, with the front wall of the house then standing on the lot referred to, and was not intended to forbid the erection, or prescribe the shape or dimension, of any porch, stoop, or platform the respective owners might choose to build.<sup>5</sup>

**762. A restriction that a grantee shall not erect any building nearer to the grantor's other land than a certain pre-**

<sup>1</sup> *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. Rep. 854, versing 14 Pa. Co. Ct. 86; *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. Rep. 961.

<sup>2</sup> *Bagnall v. Davies*, 140 Mass. 76, 2 N. E. Rep. 786.

<sup>3</sup> *Ogontz Land & Imp. Co. v. Johnson*, 168 Pa. St. 178, 31 Atl. Rep. 1008, re-

<sup>4</sup> *Smith v. Bradley*, 154 Mass. 227, 28 N. E. Rep. 14.

<sup>5</sup> *Graham v. Hite*, 93 Ky. 474.

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scribed limit does not prevent the grantee from building a new building higher than a building previously standing upon the land, though by so doing he may lessen the amount of light and air coming to the grantor's building.<sup>1</sup>

763. A restriction that no building shall be erected on the rear of a lot, the front of which is already covered by a dwelling-house, means that no part of the lot lying behind the house shall be built upon. There is no ambiguity as to what was meant by the rear of the lot. Accordingly, it was held that the erection of an L in the rear of the house, of the same height as the house itself, was a violation of the restriction.<sup>2</sup>

Under a condition as to building upon the "rear of a lot," there is no ambiguity as to what is to be deemed the rear of the lot, when at the time the deed was executed there were buildings upon the land which the deed declared conformed with the condition.<sup>3</sup>

A restriction that any dwelling-house erected on the lot granted shall not have an L more than two stories in height is not violated by erecting a building four stories in height covering the whole lot.<sup>4</sup>

764. Restrictions as to height. — A condition in a deed prohibiting the grantor from "erecting any building more than one story high" on his adjoining lot, so that the grantee "should not be incommoded in regard to light and air by any high building," does not confine the grantor to the precise height of a one-story building standing on the premises when the deed was executed; and hence the condition is not violated by the grantor in increasing the height of such one-story building by two feet, so as to make it uniform in height with the first floor of a building in front of it.<sup>5</sup>

<sup>1</sup> *Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100.

<sup>2</sup> *Sanborn v. Rice*, 129 Mass. 387.

<sup>3</sup> *Keening v. Ayling*, 126 Mass. 404.

<sup>4</sup> *Smith v. Bradley*, 154 Mass. 227, 230, 28 N. E. Rep. 14. *Morton, J.*, said: "But we do not think that this restriction means that no building shall be erected unless it has an L, or without an L; but that, if any building is erected with an L, that shall not exceed two stories in height. Parties are left to build with or without

an L, as they choose. . . . Parties are also left to build over their entire lots, if they choose, . . . and the only restriction as to the height to which a building may be carried is that which relates to an L."

<sup>5</sup> *Hobson v. Cartwright*, 93 Ky. 368, 20 S. W. Rep. 281. "It therefore should never be assumed, in absence of plain and unambiguous words to such effect, that parties contract in relation to sale or exchange of real property with sole regard to its present condition, and without at

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In a condition that "no buildings which may be erected on said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone, or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house for the term of twenty years" from a certain day, the limitation of time applies only to the mode of use and occupation, and not to the height of the buildings or to the materials of the outer walls.<sup>1</sup>

In a conveyance of a house and lot upon which there was a stable in the rear upon another street, a restriction that the roof of the stable shall never be raised more than thirteen feet above the street applies to a building of any description on the land after it has ceased to be occupied for the purpose of a stable.<sup>2</sup>

**765. Offensive trade or business.** — A restriction that buildings erected upon the land conveyed shall not be used for any trade or business "injurious or offensive to the neighboring inhabitants," in addition to prohibiting their use for several specified purposes, must be given a reasonable construction. It is a too narrow construction to hold that it prohibits only trades or kinds of business which are nuisances *per se*. "Any kind of business may become a nuisance by the manner in which it is carried on from its location, and a business may be offensive to neighboring inhabitants, and yet fall far short of being a legal nuisance, which a court of equity will abate as such. This clause in the agreement must have a reasonable construction. We cannot suppose that the parties had in mind any business which might be offensive to a person of a supersensitive organization, or to one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood, to such people, undesirable as a place of residence."<sup>3</sup> Accordingly, where the purchaser of one of the lots subject to such restriction sought to enforce it against the lessee of a house next door, built upon another one of the

all contemplating or providing for future changes and improvements that may take place in or around it." Per Lewis, J.

<sup>1</sup> Keening v. Ayling, 126 Mass. 404.

<sup>2</sup> Jeffries v. Jeffries, 117 Mass. 184.

<sup>3</sup> Rowland v. Miller, 139 N. Y. 93, 34 N. E. Rep. 765, per Earl, J.

lots, to prevent his using it for carrying on the business of an undertaker, it was held that the premises could not be used for holding autopsies, or other post-mortem examinations, dissecting, receiving, and storing of dead bodies, and for the business of holding funerals; but that, on proof that said uses had been abandoned, the office and parlors of the house could be used to solicit orders and sell coffins by sample, and that the room called a "chapel" might be used for a place of worship, within the limit of the spirit and purpose of the covenant.

A restriction that no building except a dwelling-house should be erected on the land, and that such building, when erected, should not be used for the purpose of carrying on any offensive trade, is violated by the use of the lower story of the dwelling-house as a grocery.<sup>1</sup> The restriction prescribes the kind of building that may be erected and the use that may be made of it.

A restriction against a trade or business which might be offensive to the neighborhood is violated by using the land for a coal-yard;<sup>2</sup> or by establishing upon it a planing-mill;<sup>3</sup> or by the use of the premises for an undertaker's business;<sup>4</sup> or for an exhibition of wild beasts.<sup>5</sup>

Whether keeping a stable is a "nauseous and offensive business," within the meaning of a restrictive covenant, is mainly a question of fact, depending in some measure on the extent and mode of use of the premises for the purposes of a stable.<sup>6</sup>

The term "nuisance," when used in a covenant, must be taken strictly, and therefore is not broken by permitting the erection upon the land of a national school.<sup>7</sup>

**766.** A restriction against any "trade or business" is violated by the occupation of a part of the premises by a "real estate and insurance agent or broker," or by "sign or fresco painters." Such use of the property is a violation not only of the spirit but also of the letter of the provision.<sup>8</sup> Such a restriction is violated by using the premises for a hospital, where poor patients made payments according to their means.<sup>9</sup>

<sup>1</sup> *Dorr v. Harrahan*, 101 Mass. 531.

<sup>2</sup> *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713.

<sup>3</sup> *Brouwer v. Jones*, 23 Barb. 153.

<sup>4</sup> *Rowland v. Miller*, 15 N. Y. Supp. 701.

<sup>5</sup> *Hall v. Ewin*, 37 Ch. D. 74.

<sup>6</sup> *Whitney v. Union Ry. Co.* 11 Gray, 359, 71 Am. Dec. 715.

<sup>7</sup> *Harrison v. Good*, L. R. 11 Eq. 338.

<sup>8</sup> *Trustees v. Thacher*, 87 N. Y. 311.

<sup>9</sup> *Bramwell v. Lacy*, 10 Ch. D. 691.

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A charitable institution called a "Home for Working Girls," where the inmates are provided with board and lodging, whether any payment is taken or not, is a business within such a restriction.<sup>1</sup> Upon the appeal, Cotton, L. J., said: "I cannot read the two words 'trade' and 'business' as synonymous. There may be a great many businesses which are not trades, and although, in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit — whether profit is actually obtained or not must of course be immaterial — is certainly material in considering whether what was being done is or is not a business, yet in my opinion it is not essential that there should be payment in order to constitute a business. And the mere fact that there is payment under certain circumstances does not necessarily make a thing a business which if there was no payment would not be a business."

A charitable institution for the education of the daughters of missionaries is within the prohibition of a covenant that the premises shall not be used "otherwise than as and for a private residence only, and not for any purpose of trade."<sup>2</sup>

In a covenant not to put upon the premises "any buildings, timbers, trees, or other nuisances," the words "other nuisances" include only things similar in character to those particularly named, and therefore do not include excavations or a lowering of the surface of the ground.<sup>3</sup>

767. Restrictions against the erection or use of buildings for business purposes or stables, hotels or boarding-houses, are valid.<sup>4</sup>

Where a grantor in conveying lots of land for dwelling-houses inserted a restriction that any building erected upon the land "shall not in any event be used as a stable," but in the deeds of several lots added to this restriction the words "except a private stable," and the lots in question were sold by public auction, and were described in a catalogue, which stated that the restriction in regard to stables should not be enforced so as to prevent the

<sup>1</sup> *Bolls v. Miller*, 25 Ch. D. 206, 27 Ch. D. 71, 85. *Winnepesaukee Camp Meeting Asso. v. Gordon*, 63 N. H. 505; *Morris v. Tuska-*

<sup>2</sup> *German v. Chapman*, 7 Ch. D. 271.

<sup>3</sup> *Cross v. Frost*, 64 Vt. 179.

<sup>4</sup> *Gannett v. Albree*, 103 Mass. 372;

*loosa Manuf. Co.* 83 Ala. 565, 3 So. Rep. 689.

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erection and use of private stables, though this statement was not made in the deeds of these lots, it was held that the restriction could not be enforced against the use of private stables, and that there was no intention to annex to the lots sold the right to prevent the erection and use of private stables upon any of the lots.<sup>1</sup>

768. A covenant that "the trade of an innkeeper, victualer, or retailer of wine, spirits, or beer," should not be carried on was contained in a deed of a piece of land adjoining a theatre. The purchaser was the lessee of the theatre. He erected on this piece of ground a building, the object of which was to furnish convenient egress from the theatre; but on each floor he set up a counter for selling wine, spirits, and beer, which could not be approached directly from the outside, but at which any person who paid for admittance to the theatre, when open for theatrical performances, could purchase refreshments. It was held that the purchaser was bound by the covenant. He carried on this trade only as ancillary to his other business, but nevertheless he carried on the trade in violation of the covenant.<sup>2</sup>

But where a grantee covenanted not to use the land "as a site for any hotel, tavern, public house, or beer-house," or for the trade of a "seller by retail of wine, beer, spirits, or spirituous liquors," a grocer by an alteration of the excise laws became entitled to sell wine in bottles; and it was held that in making such sales upon the premises he did not violate the restrictive covenant entered into under a different state of the law. The trade of a retailer of wine is a business quite different in character from the business of selling wine in bottles, which grocers were authorized to carry on under the new excise law.<sup>3</sup> A covenant prohibiting the use of the premises "for the sale of spiritous liquors" was held not to prevent the sale of wine in bottles, but only of spirits.<sup>4</sup>

769. The purpose for which a way is to be kept open largely determines the extent of the restriction. Thus, where deeds of lots in a block provided that "fifteen feet in width across the rear of the lots shall be subject to the right of passage

<sup>1</sup> *Beals v. Case*, 138 Mass. 138.

<sup>2</sup> *Buckle v. Fredericks*, 44 Ch. Div. 244. See, also, *Bishop of St. Albans v. Battersby*, 3 Q. B. D. 359; *Nicoll v. Fenning*, 19 Ch. D. 258.

<sup>3</sup> *Jones v. Bone*, L. R. 9 Eq. 674. And

see *London & N. W. Ry. Co. v. Garnett*, L. R. 9 Eq. 26; *Pease v. Coats*, L. R. 2 Eq. 688.

<sup>4</sup> *Feilden v. Slater*, L. R. 7 Eq. 523.

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for horses, carriages, and carts for the private convenience" of the lot-owners, and the passage "kept open" for the "use and purpose aforesaid and no other," it was held that the deeds did not restrict the owners from building over the passage, so long as the fifteen feet space, of reasonable height, was left for access to the lots.<sup>1</sup> Mr. Justice Andrews, delivering the judgment of the Court of Appeals, said: "It is claimed that the clause in the deed-poll, that the passage was to be 'kept open,' can only be satisfied by permitting it to remain open to the sky, and that light and air for the benefit of the several lots was one of the objects intended by the reservation of the passageways. But the deed-poll makes no reference to this purpose. It does not reserve an open way for general use, but expressly limits and defines the uses for which the ways are intended, and to which they were to be appropriated."

770. A stipulation for a passageway in the rear of a block of buildings, for the benefit of the abutters, implies a passageway open to the sky for light, air, and prospect, as well as for passing. An abutter upon such passageway may be enjoined from building bay-windows from a point eight feet above the sidewalk, and extending three or four feet into the passageway, to the top of the building. If this might be done, it would be difficult to place any practical limit to the building over and filling up the passageway.<sup>2</sup>

III. *Who have the Burden and Benefit of Restrictions.*

771. Where the owner of a tract of land adopts a general scheme for its improvement, dividing it into lots, and conveying these with uniform restrictions as to the purposes for which the land may be used, such restrictions create equitable easements in favor of the owners of the several lots, which may be enforced in equity by any one of such owners. Such restrictions are not for the benefit of the grantor only, but for the benefit of all purchasers. The owner of each lot has as appurtenant to his lot a

<sup>1</sup> *Hollins v. Demorest*, 129 N. Y. 676, 29 N. E. Rep. 1093, affirming 16 N. Y. Supp. 384.

<sup>2</sup> *Attorney-General v. Williams*, 140 Mass. 329, 2 N. E. Rep. 80, 3 N. E. Rep. 214, 54 Am. Rep. 468; *Salisbury v. Andrews*, 128 Mass. 336. In this case the

obstruction was a bridge across a court. *Brooks v. Reynolds*, 106 Mass. 31; *Schworer v. Boylston Market Asso.* 99 Mass. 285. In this case the obstruction was a building across the passageway at the height of about sixteen feet above the ground.



right in the nature of an easement upon the other lots, which he may enforce in equity.<sup>1</sup>

Whether such a restriction creates a right which inures to the benefit of purchasers is a question of intention, and to create such a right it must appear from the terms of the grant, or from the surrounding circumstances, that the grantor intended to create an easement in favor of the purchasers.<sup>2</sup>

The fact that like restrictions have been inserted in all the deeds of the grantor conveying adjacent land is a circumstance to be considered as tending to show that the restrictions were for the benefit of all the lots conveyed, as well as those retained by the

<sup>1</sup> *Collins v. Castle*, 36 Ch. D. 243; *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. Rep. 1122; *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. Rep. 628; *Ladd v. Boston*, 151 Mass. 585, 24 N. E. Rep. 858, 21 Am. St. Rep. 481; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. Rep. 691, 32 Am. St. Rep. 476; *Jeffries v. Jeffries*, 117 Mass. 184; *Sanborn v. Rice*, 129 Mass. 387; *Payson v. Burnham*, 141 Mass. 547, 6 N. E. Rep. 708; *Beals v. Case*, 138 Mass. 138; *Peck v. Conway*, 119 Mass. 546; *Ayling v. Kramer*, 133 Mass. 12; *Tobey v. Moore*, 130 Mass. 448; *Linzee v. Mixer*, 101 Mass. 512; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Whitney v. Union Ry. Co.* 11 Gray, 359; *Peabody Heights Co. v. Willson* (Md.), 32 Atl. Rep. 386; *Newbold v. Peabody Heights Co.* 70 Md. 493, 17 Atl. Rep. 372; *Trustees v. Lynch*, 70 N. Y. 440; *Gibert v. Peteler*, 38 N. Y. 165, 168, per Clarke, J.; *Barrow v. Richard*, 8 Paige, 351; *Brouwer v. Jones*, 23 Barb. 153; *Hodge v. Sloan*, 107 N. Y. 244; *Burbank v. Pillsbury*, 48 N. H. 475; *Clark v. Martin*, 49 Pa. St. 289; *St. Andrew's Church's App.* 67 Pa. St. 512; *Muzzarelli v. Hulshizer*, (Pa. St.) 30 Atl. Rep. 291; *Morris v. Tuscaloosa Manuf. Co.* 83 Ala. 565, 3 So. Rep. 689.

<sup>2</sup> *Whitney v. Union Ry. Co.* 11 Gray, 359. *Bigelow, J.*, said: "When it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right, in the

nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land." Again, in *Parker v. Nightingale*, 6 Allen, 341, 344, *Bigelow, C. J.*, said: "A court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy as exceptions or reservations out of a grant nor binding as covenants real running with the land. . . . Restrictions and limitations which may be put on property by means of such stipulations derive their validity from the right which every owner of the fee has to dispose of his estate either absolutely or by a qualified grant, or to regulate the manner in which it shall be used and occupied. So long as he retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally, and be specifically enforced in equity. When he disposes of it by grant or otherwise, those who take under him cannot equitably refuse to fulfil stipulations concerning the premises of which they had notice."

grantor. If, however, the grantor has conveyed some of the adjacent land by deeds containing no restrictions, the inference of a general plan of restrictions for the benefit of all the lots is negatived.<sup>1</sup>

The purpose had in view by the grantor who arranged the general plan of restrictions is to be taken into consideration in determining whether such restrictions are for the benefit of all purchasers of any part of the land to which they are made applicable.<sup>2</sup>

**772. The right of one owner of a lot to enforce restrictions upon other lots rests upon the ground that the restrictions were for the benefit of all the lots subject to the same restrictions.** "Where there is a general scheme or plan adopted and made public by the owner of a tract for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which the buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan,—one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been made part of the subject-matter of his purchase."<sup>3</sup>

Land was sold to a purchaser who entered into restrictive covenants for himself, his heirs and assigns as to the buildings to be erected upon it, but the grantor did not enter into any covenants as to the land retained. The grantor sold to other persons various lots of the part retained, without requiring any similar covenants from them, and they appear to have had no notice of the first purchasers' covenants. Later still, the grantor bought back the land he had sold to the first purchaser. It was held that the

<sup>1</sup> Coughlin v. Barker, 46 Mo. App. 54.

<sup>2</sup> De Gray v. Monmouth Beach Club-house Co. 50 N. J. Eq. 329, 24 Atl. Rep. 388.

<sup>3</sup> De Gray v. Monmouth Beach Club-house Co. 50 N. J. Eq. 329, 24 Atl. Rep. 388, Syllabus by the court; Clark v.

Devos, 124 N. Y. 120, 26 N. E. Rep. 275; Renals v. Cowlishaw, 9 Ch. D. 125, affirmed 11 Ch. D. 866; Mackenzie v. Childers, 43 Ch. D. 265; Spicer v. Martin, 14 App. Cas. 12, 25; Hislop v. Leckie, 6 App. Cas. 560.

benefits of the covenants of the first purchaser did not pass to the subsequent purchasers, and that they could not enforce them against the grantor after the repurchase.<sup>1</sup> The ground of the decision seems to be that the subsequent purchasers, having no notice of the covenants in the first deed, did not purchase with any intention on their part, or with any agreement on the part of their grantor, that they should have the benefit of such covenants.

A grantor divided a parcel of land into thirteen city lots, and conveyed twelve of them by contemporaneous deeds, each of which restricted buildings thereon to first-class dwelling-houses only, except that the deed of one lot, which was an irregular corner lot and unfit for a dwelling, permitted the erection of "a store" on it. The remaining lot, which was also an irregular corner and unfit for a dwelling, was afterwards conveyed without restriction. The grantor owned no other land in the vicinity. It was held that the restriction was imposed on each lot for the benefit of all the others, and was enforceable by each owner against all the others. Mr. Justice Knowlton, delivering the judgment of the court, said: "In cases of this kind it is important to ascertain the purpose of the grantor in imposing the restrictions, — whether they are intended for his personal benefit or for the benefit of the lot-owners generally. His intention is to be gathered from his acts and the circumstances. The fact that the grantor of this land had conveyed two lots without restrictions, one of them nearly two years before the plan was drawn cutting up the tract into lots, and the other to the same grantee in the same month that the plan was made, and apparently before he had perfected his scheme in regard to the sale of the remainder, is not very significant. . . . As the grantor owned no other land in the vicinity, it seems clear that the restriction was imposed on each lot for the benefit of the owners of all the others, and that it was a part of a general scheme for the improvement of the entire property."<sup>2</sup>

**773.** The restrictive covenants which equity enforces between purchasers inter sese are those that have been imposed by a common vendor or the original owners of a tract of land, in pursuance of a general plan for the development and

<sup>1</sup> *Keates v. Lyon*, 4 Ch. App. 218.

<sup>2</sup> *Hano v. Bigelow*, 155 Mass. 341, 343, 29 N. E. Rep. 628.

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improvement of the property by laying it out in streets, avenues, and lots, adopting some uniform or settled building scheme. The restrictions generally relate to number, location, size, or style of buildings to be erected, or the uses to which such buildings or the land may be put.<sup>1</sup> In case of a breach of such covenant, "the action is held not to be maintainable between purchasers not parties to the original covenant, in cases in which:—(1) it does not appear that the covenant was entered into to carry out some general scheme or plan for the improvement or development of the property which the act of defendant disregards in some particular;<sup>2</sup> (2) it does not appear that the covenant was entered into for the benefit of the land of which complainant has become the owner;<sup>3</sup> (3) it appears that the covenant was not entered into for the benefit of subsequent purchasers, but only for the benefit of the original covenantee and his next of kin;<sup>4</sup> (4) it appears that the covenant has not entered into the consideration of the complainant's purchase;<sup>5</sup> (5) it appears that the original plan has been abandoned without dissent, or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and to thus render its enforcement unreasonable."<sup>6</sup>

Where an original purchaser covenanted not to do or suffer anything which would be a nuisance to the grantor's adjoining property, and such purchaser sold in lots to others who entered

<sup>1</sup> *De Gray v. Monmouth Beach Club-house Co.* 50 N. J. Eq. 329, 24 Atl. Rep. 388, per Green, V. C., citing *Whatman v. Gibson*, 9 Sim. 196; *Coles v. Sims, Kay*, 56, 5 De Gex, M. & G. 1; *Western v. Macdermot*, L. R. 1 Eq. 499, 2 Ch. App. 72; *Richards v. Revitt*, 7 Ch. Div. 224; *Nottingham Brick, &c. Co. v. Butler*, 15 Q. B. Div. 261, 16 Q. B. Div. 778; *Martin v. Spicer*, 34 Ch. Div. 1, 14 App. Cas 12; *Collins v. Castle*, 36 Ch. Div. 243; *MacKenzie v. Childers*, 43 Ch. Div. 265; *Parker v. Nightingale*, 6 Allen, 341; *Linzee v. Mixer*, 101 Mass. 512; *Jeffries v. Jeffries*, 117 Mass. 184; *Hamlen v. Werner*, 144 Mass. 396, 11 N. E. Rep. 684.

<sup>2</sup> *Sheppard v. Gilmore*, 57 L. J. Ch. 6; *Dana v. Wentworth*, 111 Mass. 291; *Beals v. Case*, 138 Mass. 138.

<sup>3</sup> *Sharp v. Ropes*, 110 Mass. 381; *Keates v. Lyon*, 4 Ch. App. 218; *Jewell v. Lee*,

14 Allen, 145; *Renals v. Cowlshaw*, 11 Ch. Div. 866.

<sup>4</sup> *Master v. Hansard*, 4 Ch. Div. 718. See *Nottingham Brick, &c. Co. v. Butler*, 15 Q. B. Div. 261; *Collins v. Castle*, 36 Ch. Div. 243; *Renals v. Cowlshaw*, 9 Ch. Div. 125.

<sup>5</sup> *Richards v. Revitt*, 7 Ch. Div. 224; *Renals v. Cowlshaw*, 11 Ch. Div. 866; *Master v. Hansard*, 4 Ch. Div. 718; *Keates v. Lyon*, 4 Ch. App. 218.

<sup>6</sup> *Bedford v. British Museum*, 2 Mylne & K. 552; *Sayers v. Collyer*, 28 Ch. Div. 103; *Trustees v. Thacher*, 87 N. Y. 311; *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. Rep. 741; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. Rep. 11; *Roper v. Williams*, Turn. & R. 18; *Peck v. Matthews*, L. R. 3 Eq. 515. See *German v. Chapman*, 7 Ch. Div. 271.

into similar covenants, it was held that these covenants operated to protect not only the adjoining land of the original grantor, but also the different lots of the sub-purchasers, who were entitled to enforce the covenants.<sup>1</sup>

774. One grantee, to enforce a restriction against another grantee of a common grantor, must show that he is entitled to the benefit of the covenant, and as well that the other grantee is subject to the burden of it. The fact that the same covenant has been incorporated in the deeds of both grantees, and in all deeds made by the grantor of any portion of the same land, is not sufficient evidence that the covenant has been entered into for the benefit of all the land so conveyed.<sup>2</sup> "The right of an owner of a lot to enforce a covenant to which he is not a party or an assign, restrictive of the use of other lands, is dependent on the covenant having been made for the benefit of this lot. Obviously, while a subsequent purchaser might, by the operation of this rule, acquire a right of action against a prior purchaser, the prior purchaser would acquire no rights from a covenant entered into by a subsequent purchaser, unless there exists some condition which will entitle him to the benefit of such covenant. The right of grantees from the common grantor to enforce, *inter sese*, covenants entered into by each with said grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property, and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase."<sup>3</sup>

The burden is upon the plaintiff, in a suit to enforce a restriction, that this was intended to create a servitude upon the defend-

<sup>1</sup> *Harrison v. Good*, L. R. 11 Eq. 338; *McLean v. McKay*, L. R. 5 P. C. 327; *Eastwood v. Lever*, 4 De G. J. & S. 114.

<sup>2</sup> *Keates v. Lyon*, 4 Ch. App. 218; *Renals v. Cowlishaw*, 11 Ch. Div. 866; *Nottingham Patent Brick Co. v. Butler*, 15 Q. B. D. 261, affirmed 16 Q. B. D. 778; *In re Birmingham, &c. Land Co.* (1893) 1 Ch. 342; *Dana v. Wentworth*, 111 Mass. 291; *Jewell v. Lee*, 14 Allen, 145; *Sharp v. Ropes*, 110 Mass. 381; *Beals v. Case*, 138 Mass. 138; *Graham v. Hite*, 93 Ky. 474, 20 S. W. Rep. 506; *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. Rep. 543; *De Gray v. Monmouth Beach Clubhouse Co.* 50 N. J. Eq. 329, 24 Atl. Rep. 388; *Coughlin v. Barker*, 46 Mo. App. 54.

<sup>3</sup> *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. Rep. 543, per Green, V. C.

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ant's land, which by implication is annexed and made appurtenant to the plaintiff's land.<sup>1</sup>

A grantor inserting in a deed a restriction for the benefit of his other land retained or conveyed may state the purpose of it, and not leave this wholly to inference.<sup>2</sup> If the purpose is not stated, it must be proved before the grantor, or any one claiming under him, can claim the benefit of the restriction.

The owner of a parcel of land bounding on a street conveyed it by a deed containing a condition that the grantee, or his heirs or assigns, should not build on the land within eight feet of the street. The grantee conveyed the land in several lots. It was held that the grantor could not maintain a bill in equity, for the benefit of the owners of some of these lots, to restrain the owner of another from violating the condition, in the absence of evidence that the condition was imposed as part of a general plan for the benefit of the land granted and of other land on the street.<sup>3</sup>

**775.** But it is not essential that the grantor should state in his deed that a restriction therein is intended for the benefit of his other land when this is the fact. This will usually be inferred if the situation of the grantor's other land, with reference to that conveyed, is such that the restriction is clearly for the benefit of the land retained; for in most cases there could be no object in the restriction except to benefit the land retained.<sup>4</sup>

**776.** The absence of mutuality of restriction is a circumstance tending to the conclusion that the restriction was personal to the grantor; and on the other hand, where such mutuality appears, it is clear that the restriction was a part of a general

<sup>1</sup> *Beals v. Case*, 138 Mass. 138; *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Badger v. Boardman*, 16 Gray, 559.

<sup>2</sup> *Patching v. Dubbins, Kay*, 1; *Skinner v. Shepard*, 130 Mass. 180; *Coughlin v. Barker*, 46 Mo. App. 54.

<sup>3</sup> *Dana v. Wentworth*, 111 Mass. 291. Gray, J., declared the judgment of the chancellor of New Jersey, in *Winfield v. Henning*, 21 N. J. Eq. 188, inconsistent with the decisions in Massachusetts and in England.

<sup>4</sup> *McLean v. McKay*, L. R. 5 P. C. 327, 335, 21 Weekly Rep. 798, where it is said:

"There could be no object in stipulating that the land should be left open for the benefit of both parties, unless it meant for the benefit of both parties as owners of the lands which adjoin the plot. Therefore the implication is natural and irresistible that, when the parties speak of leaving this piece open for the common benefit of both, they mean for the common benefit of both as holders of adjoining lands." See, also, *Mann v. Stephens*, 15 Sim. 377; *Coughlin v. Barker*, 46 Mo. App. 54; *St. Andrew's Church's App.* 67 Pa. St. 512.

scheme, and was for the benefit of all the land. "Thus, where the owner of a particular piece of land, on which a row of houses is intended to be built, executes a deed reciting that it has been laid out and is intended to be dealt with in a particular manner, and declares that it shall be a general and indispensable condition of the sale of all or of any part of the land that the several proprietors for the time being shall observe and abide by the several restrictions and stipulations therein contained, and that he himself will at all times observe the like restrictions and stipulations, and these restrictions and stipulations are also enforced by mutual covenants, although the question may afterwards arise between subsequent purchasers of different portions of the land, one of the subsequent lot-owners will be bound and another will be entitled to enforce the covenant."<sup>1</sup>

But there may be mutuality without any express covenant by the grantor that his remaining land shall be bound by restrictions similar to those imposed upon the land sold. Such a restrictive covenant on the part of the grantor may be implied from the expressions of intention contained in his deed, or from the intent to be gathered from the whole instrument and the attending circumstances of the transaction. In this way a covenant by the grantor with every purchaser by deed having restrictive covenants, that the grantor's remaining land shall not be used in a manner inconsistent with covenants imposed in his deeds, may be implied.<sup>2</sup>

777. It is a question of fact, to be determined from all the circumstances of the case, whether restrictive covenants are for the benefit of the vendor alone, or are for the common benefit of all the purchasers. Mr. Justice Wills makes the following statement of the law: "The principle which appears to me to be deducible from the cases is, that where the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant

<sup>1</sup> *Coughlin v. Barker*, 46 Mo. App. 54.      <sup>2</sup> *Mackenzie v. Childers*, 43 Ch. D. 67, per Thompson, J. See *Whatman v. Gibson*, 9 Sim. 196.

by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit.”<sup>1</sup> Upon appeal, the Master of the Rolls, Lord Esher, declared Mr. Justice Wills’ view of the law to be perfectly correct, and, in further elucidation of the principle, said: “There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others.”<sup>2</sup>

**778. Conditions of sale under which building lots are put up at auction may apply to lots remaining unsold as well as to those sold at the auction.** “It appears to me,” says Mr. Jus-

<sup>1</sup> Nottingham Patent Brick Co. v. Butler, 15 Q. B. D. 261, 268, affirmed 16 Q. B. D. 778, Lord Esher, M. R., and Lord Justice Lindley, approving Mr. Justice Wills’ view of the law. See, also, Spicer v. Martin, 14 App. Cas. 12; Renals v. Cowlishaw, 9 Ch. D. 125, 11 Ch. D. 866; Western v. Macdermot, 2 Ch. App. 72; Mann v. Stephens, 15 Sim. 377. For examples of restrictive covenants for the benefit of the grantor alone, see Keates v. Lyon, 4 Ch. App. 218; Master v. Han-

sard, 4 Ch. D. 718. In Peck v. Conway, 119 Mass. 546, 549, Morton, J., said: “The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.”

<sup>2</sup> Nottingham Patent Brick Co. v. Butler, 16 Q. B. D. 778, 785.



tice Wills, "that where land is put up to auction in lots, and two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor purposes to sell the whole of his property. Where he retains none, how can the covenants be for his benefit? and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbors, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbor might choose to put his property to? Where, therefore, the vendor desires to sell at the auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers; and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number of the lots may fail to find purchasers."<sup>1</sup> The judgment in this case and the opinion quoted are approved in a later case, in which Mr. Justice Stirling said: "Though the retainer by the vendor of some part of the property is a highly important element, it is after all only an element to be taken into consideration along with other circumstances in ascertaining the intention. It appears to me that, although the vendor may not part with his whole estate, there may be circumstances which show that the intention was that each purchaser should be entitled to enforce building restrictions against the vendor and every other purchaser." After stating the subject of the restrictive

<sup>1</sup> Nottingham Patent Brick Co. v. Butler, 15 Q. B. D. 261, 269, affirmed on appeal, 16 Q. B. D. 778, 784, Lord Esher, Master of the Rolls, saying: "But I think that Wills', J.'s, view of the law on this subject is perfectly correct. In my view, he is right in saying that, when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at this sale to sell the whole of the property, the question whether it is intended that each of the purchasers shall be liable, in respect of those restrictive

covenants, to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention. And, if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a court of equity will, in favor of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter."

conditions, he further says: "It seems to me, therefore, that these particulars and conditions constituted<sup>1</sup> an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon, and that the vendors ought not to be allowed to destroy the value of that which was sold by authorizing the use of a part of the property for a purpose inconsistent with the law by which they purported to bind the whole."<sup>2</sup>

779. The decisions are not in accord as to the logical principle upon which they rest, though they agree in the result that restrictive covenants, made for the benefit of subsequent purchasers of the land to which the restrictions apply, may be enforced by any one purchaser against another. The theory that such covenants create easements upon the lands of each purchaser, for the benefit of all the lands subject to the same restrictions, has the support of the courts of many leading States;<sup>3</sup> but the courts of England, as well as those of some of the States, repudiate the idea that the courts interfere on the ground of protecting an easement.<sup>4</sup> "The equity would seem to spring from the presumption that each purchaser has paid an enhanced price for his property, relying on the general plan by which all the prop-

<sup>1</sup> In the language of Lord Macnaghten in *Spicer v. Martin*, 14 App. Cas. 12.

<sup>2</sup> *In re Birmingham, &c. Land Co.* [1893] 1 Ch. 342, 349, 351. See, also, *Peacock v. Penson*, 11 Beav. 355, 359; *Collins v. Castle*, 36 Ch. D. 243. It is the practice of vendors to reserve by express conditions, power to make future sales discharged from restrictive conditions. An example is to be found in the case of *Sidney v. Clarkson*, 35 Beav. 118.

<sup>3</sup> *Alabama*: *Webb v. Robbins*, 77 Ala. 176. *Illinois*: *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. Rep. 503. *Massachusetts*: *Parker v. Nightingale*, 6 Allen, 341; *Beals v. Case*, 138 Mass. 138; *Whitney v. Union Ry.* 11 Gray, 359, 71 Am. Dec. 715; *Ladd v. Boston*, 151 Mass. 585, 24 N. E. Rep. 858, 21 Am. St. Rep. 481, and cases cited in § 771. *Minnesota*: *Kettle River R. Co. v. Eastern Ry. Co.* 41 Minn. 461, 474, 43 N. W. Rep. 469. *Missouri*:

*Coughlin v. Barker*, 46 Mo. App. 54. *New York*: *Trustees v. Lynch*, 70 N. Y. 440; *Equitable Life Soc. v. Brennan*, 74 Hun, 576, 26 N. Y. Supp. 600, 30 Abb. N. C. 260; *Barrow v. Richard*, 8 Paige, 351; *Raynor v. Lyon*, 46 Hun, 227; *Amerman v. Deane*, 132 N. Y. 355. *Rhode Island*: *Greene v. Creighton*, 7 R. I. 1, 9; *Middletown v. Newport Hospital*, 16 R. I. 319.

<sup>4</sup> In *Tulk v. Moxhay*, 2 Phil. 774, 777, Lord Cottenham says: "It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased." *New Jersey*: *De Gray v. Monmouth Beach Clubhouse Co.* 50 N. J. Eq. 329, 363, 24 Atl. Rep. 388.

erty is to be subjected to the restricted use being carried out, and that, while he is bound by and observes the covenant, it would be inequitable to him to allow any other owner of lands subject to the same restriction to violate it."<sup>1</sup>

A restriction in a conveyance, when it is for the benefit of the grantor's adjoining land, may be regarded as a reservation in the nature of an equitable easement. This was the view of the Supreme Court of Illinois in a case where the restrictions were that any building to be erected on the land conveyed should be one which would not materially increase the fire exposure of the grantor's buildings on either side, and that no building which would darken any light should be placed within three feet of the west line of the lot conveyed.<sup>2</sup>

A covenant by the owner of a block of several lots, in a deed of one of them, that he would sell the remaining lots to parties who would "cause to be erected single dwellings only on each lot," inures to the benefit of all subsequent purchasers of the remaining lots, and creates an easement in their favor.<sup>3</sup>

**780. One who takes land with notice of a restrictive agreement affecting it cannot equitably refuse to perform it, though the agreement may not be a covenant which runs with the land, or creates a technical qualification of the estate conveyed.**<sup>4</sup> This

<sup>1</sup> *De Gray v. Monmouth Beach Club-house Co.* 50 N. J. Eq. 329, 24 Atl. Rep. 388, per Green, V. C., who also says: "While cases involving light, air, or view might, in some respects, be based on the doctrine of easements, it is not satisfactory when it comes to be applied to covenants as to uses to which buildings are to be put, nor could the covenant, if it created an easement, be suspended because a subsequent purchaser did not buy with the restrictions of the covenant in view."

<sup>2</sup> *Tinker v. Forbes*, 136 Ill. 221, 241, 26 N. E. Rep. 503.

<sup>3</sup> *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. Rep. 556.

<sup>4</sup> *Tulk v. Moxhay*, 2 Phil. Ch. 774 (said by Brett, L. J., in *Haywood v. Society*, 8 Q. B. Div. 403, 407, to be the leading case on the subject); *Mann v. Stephens*, 15 Sim. 377; *Bristow v. Wood*, 1 Colby, 480; *Coles v. Sims*, Kay, 56, 5

*De Gex, M. & G.* 1; *Wilson v. Hart*, 1 Ch. App. 463; *Feilden v. Slater*, L. R. 7 Eq. 523; *Richards v. Revitt*, 7 Ch. Div. 224; *Patman v. Harland*, 17 Ch. Div. 353; *De Mattos v. Gibson*, 4 De Gex & J. 276; *Piggott v. Stratton*, 1 De Gex, F. & J. 33; *Renals v. Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866; *Keates v. Lyon*, 4 Ch. App. 218; *Spicer v. Martin*, 14 App. Cas. 12; *Mackenzie v. Childers*, 43 Ch. Div. 265; *Clegg v. Hands*, 44 Ch. Div. 503; *Bedford v. British Museum*, 2 Mylne & K. 552; *Whatman v. Gibson*, 9 Sim. 196 (1838), the first case in which equity enforced a covenant against an assignee with notice; *Schreiber v. Creed*, 10 Sim. 9 (1839); *Child v. Douglas*, Kay, 560; *Western v. McDermot*, L. R. 1 Eq. 499, 2 Ch. App. 72; *Patching v. Dubbins*, Kay, 1. **Alabama:** *Morris v. Tuscaloosa Manuf. Co.* 83 Ala. 565, 3 So. Rep. 689; *Webb v. Robbins*, 77 Ala. 176. **Illinois:**

is a doctrine of equity, and is undoubtedly an encroachment on the general doctrine of the common law, which does not favor covenants running with the land. Lord Cottenham states the principle governing courts of equity: "That this court has jurisdiction to enforce a contract, between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract; the owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a square garden; and it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant; and nothing could be more inequitable than that

*Frye v. Partridge*, 82 Ill. 267. **Indiana**: *Williamson v. Yingling*, 80 Ind. 379. **Maryland**: *Newbold v. Peabody Heights Co.* 70 Md. 493, 17 Atl. Rep. 372; *Peabody Heights Co. v. Willson* (Md.), 32 Atl. Rep. 386. **Massachusetts**: *Whitney v. Union Ry. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen, 341; *Badger v. Boardman*, 16 Gray, 559; *Peck v. Conway*, 119 Mass. 546; *Hamlen v. Werner*, 144 Mass. 396, 11 N. E. Rep. 684. **Michigan**: *Watrous v. Allen*, 57 Mich. 362, 24 N. W. Rep. 104, 58 Am. Rep. 363. **Minnesota**: *Kettle River R. Co. v. Eastern Ry. Co.* 41 Minn. 461, 474, 43 N. W. Rep. 469. **Missouri**: *Coughlin v. Barker*, 46 Mo. App. 54, 61, per Thompson, J., in an able opinion. **New Jersey**: *De Gray v. Monmouth Beach Clubhouse Co.* 50 N. J. Eq. 329, 24 Atl. Rep. 384; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Winfield v. Henning*, 21 N. J. Eq. 188; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. Rep. 190; *Hayes v. Waverly, &c. R. Co.* 51 N. J. Eq. 345, 27 Atl. Rep. 648. **New York**: *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335; *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713; *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218; *Brouwer v. Jones*, 23 Barb. 153; *Trustees v. Lynch*, 70 N. Y. 440; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785, 38 Barb. 513; *Steward v. Winters*, 4 Sandf. Ch. 587; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Hayward Homestead Assn. v. Miller*, 26 N. Y. Supp. 1091, 6 Misc. Rep. 254. **Pennsylvania**: *Clark v. Martin*, 49 Pa. St. 289; *St. Andrew's Church's App.* 67 Pa. St. 512.

the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." <sup>1</sup>

In a leading American case the same doctrine is declared: "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." <sup>2</sup>

The doctrine on this subject is strictly limited to restrictive stipulations, and does not extend to covenants to expend money, to make repairs, or the like, or to perform any act in regard to land, unless such covenants run with the land at law, although a purchaser takes with notice of them. <sup>3</sup>

781. A court of equity will enforce any agreement affecting land against a purchaser with notice of it. Lord Cottenham, about half a century ago, upon this point said: "That the question does not depend upon whether the covenant runs with the land is evident from this, that, if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." <sup>4</sup> In a recent leading case Vice-Chancellor Hall to like effect says: "It is now well settled that the burden

<sup>1</sup> *Tulk v. Moxhay*, 2 Phillips, 774, 777.

<sup>2</sup> *Whitney v. Union Ry. Co.* 11 Gray, 359, 364, 71 Am. Dec. 715, per Bigelow, J.

<sup>3</sup> *Austerberry v. Oldham*, 29 Ch. D. 750, where the covenant was to keep a road in repair; *Haywood v. Brunswick Building Soc.* 8 Q. B. D. 403, 408, where the covenant was to build and repair. These cases practically overrule *Cooke v. Chilcott*, 3 Ch. D. 694. See, also, *London & S. W. R. Co. v. Gomm*, 20 Ch. D. 562, and *Andrew v. Aitken*, 22 Ch. D. 218,

which carry the limitation of the doctrine still further.

<sup>4</sup> *Tulk v. Moxhay*, 2 Phil. 774, 778, 11 Beav. 571. This case is cited and followed as to restrictive covenants in many cases. *Brown v. Great East. R. Co.* L. R. 2 Q. B. Div. 406; *London, &c. Ry. Co. v. Gomm*, 20 Ch. Div. 562, 576; *Hodge v. Sloan*, 107 N. Y. 244, 251; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206-213; *Brewer v. Marshall*, 19 N. J. Eq. 537-543; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. Rep. 190.

of a covenant entered into by a grantee in fee for himself, his heirs and assigns, although not running with the land at law, so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, having notice thereof. Who, then (other than the original covenantee), is entitled to the benefit of the covenant? . . . It may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building lots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of, the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, inures to the assigns of the first purchaser,—in other words, runs with the lands of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established.”<sup>1</sup>

<sup>1</sup> *Renals v. Cowlshaw*, 9 Ch. Div. 125, 128, citing *Mann v. Stephens*, 15 Sim. 377; *Western v. Macdermott*, 2 Ch. App. 72; and *Coles v. Sims*, 5 De Gex, M. & G. 1.

The opinion in *Renals v. Cowlshaw* is adopted in the same case on appeal, 11 Ch. Div. 866, and approved in *Spicer v. Martin*, 14 App. Cas. 12.

In *Peabody Heights Co. v. Willson* (Md.), 32 Atl. Rep. 386, Robinson, C. J., said: “It may be considered as settled, since the cases of *Mann v. Stephens*, 15 Sim. 377, *Western v. Macdermott*, 2 Ch. App. 72, and *Renals v. Cowlshaw*, 9 Ch. Div. 125, that all persons coming in with notice are bound by the covenants. In *Keates v. Lyon*, 4 Ch. App. 218, the court held that the sub-purchasers were not entitled to the benefit of the covenants, because it did not appear that they had knowledge of the covenants when they became purchasers. In his judgment the lord justice refers with approval to the case of *Whatman v. Gibson*, 9 Sim. 196, in which the vice-chancellor said: ‘I see no reason why such an agreement

should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighboring houses used in such a way as to preserve the general uniformity and respectability of the row.’ In *Master v. Hansard*, 4 Ch. Div. 718, it was held that the restrictive covenant was made for the benefit of the lessors, to enable them to make the most of the property retained by them, and for the further reason, says Bramwell, J., ‘it appears monstrous to hold that this covenant, the existence of which was never communicated to the plaintiffs’ predecessors in title when they took their lease, is to be construed as inuring for their benefit.’ So these cases cannot be said to qualify in any manner the principle laid down in *Mann v. Stephens*, and in other cases to which we have referred,—that a purchaser taking an estate with notice of a covenant or agreement respecting it is bound by the terms of the covenant, even though it does not, in the strict sense of the term, ‘run with the land.’”

§§ 782, 783.] RESTRICTIONS AS TO THE USE OF LAND.

**782.** Constructive notice to an assignee is sufficient to make the covenant binding upon him. Subsequent purchasers of the land claiming through a deed which sets out the restrictions are charged with notice of them, and occupy the same position as the grantee in that deed did.<sup>1</sup> Purchasers are conclusively presumed to have examined every recorded deed in the line of title and to know its contents.<sup>2</sup> Other forms of notice which put purchasers upon inquiry may be sufficient to charge them with notice of restrictive covenants affecting the land.<sup>3</sup>

If the restrictive covenant is contained in a separate instrument, and not in a deed in the line of title, and not referred to in such a deed, a purchaser may have no constructive notice of it.<sup>4</sup>

**783.** The fact that a purchaser of a house in a block found all the houses set back eight feet from the street does not charge him with notice of an agreement between the owners of the houses in the block to set back the houses that distance. He was not bound to know from that circumstance that there was any binding agreement in reference to the open space, and it could not be assumed that there was.<sup>5</sup>

The fact that the attorney of the purchaser of such house searched the title and found such an agreement of record is not actual notice of it to the purchaser, the record itself not being notice by reason of a defective acknowledgment. "It would be going a great way to hold that we must presume that, in searching the records, counsel found such an agreement, and then presume further that he communicated the information to his client. But there is no presumption that any one has notice of a paper which is not prop-

<sup>1</sup> *London, Chatham, &c. R. Co. v. Bull*, 47 L. T. 413; *Coles v. Sims*, 5 De G., M. & G. 1; *Peck v. Conway*, 119 Mass. 546; *Whitney v. Union Ry. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Duncan v. Central Passenger Ry. Co.* 85 Ky. 525, 4 S. W. Rep. 228; *Morris v. Tuskaloosa Manuf. Co.* 83 Ala. 565, 3 So. Rep. 689; *Webb v. Robbins*, 77 Ala. 176, 183; *Bradley v. Walker*, 17 N. Y. Supp. 383, 14 N. Y. Supp. 315; *Equitable Life Assur. Soc. v. Brennan*, 74 Hun, 576, 26 N. Y. Supp. 600, 30 Abb. N. C. 260; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Hayes v. Waverly, &c. R. Co.* 51 N. J. Eq. 345, 27 Atl. Rep. 648; *Middletown v. Newport Hospital*, 16 R. I. 319. See

*Hall v. Solomon*, 61 Conn. 476, 23 Atl. Rep. 876, where the restriction was by parol agreement.

<sup>2</sup> *Acer v. Westcott*, 46 N. Y. 384; *McPherson v. Rollins*, 107 N. Y. 316, 322, 14 N. E. Rep. 411; *Gibert v. Peteler*, 38 N. Y. 165; *Trustees v. Thacher*, 87 N. Y. 311.

<sup>3</sup> *Morland v. Cook*, L. R. 6 Eq. 252; *Bank of Ireland v. Brookfield Linen Co.* 15 L. R. Ir. 37.

<sup>4</sup> *Carter v. Williams*, L. R. 9 Eq. 678.

<sup>5</sup> *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. Rep. 1079, overruling dictum of *Sutherland, J.*, to the contrary in *Tallmadge v. East River Bank*, 26 N. Y. 105, 111.

erly recorded, and here, if the defendant's attorney had found this record, he would have seen that the agreement did not bind a married woman, the owner of the house, who executed the agreement under a defective acknowledgment, and therefore did not affect this lot, as the record did not furnish any evidence that she had ever executed the agreement."<sup>1</sup>

#### IV. *When Restrictive Covenants run with the Land.*

**784.** A restrictive covenant runs with the land if created for the benefit of the land conveyed, or of that of which the grantor remains the owner, and intended to be annexed to such land. In such case it would become an easement appurtenant thereto, and would pass to a grantee. "The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances."<sup>2</sup> When, by the construction of a grant, it appears that it was the intention of the parties to create or reserve a right in the nature of a servitude in the land granted, for the benefit of other land owned by the grantor, no matter in what form such intention may be expressed, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass, with the lands, to all subsequent grantees.<sup>3</sup> The right of a grantee to the benefit of such a covenant does not depend upon his ability to maintain an action of law for its breach, but will be enforced in equity. "Any grantee of the land to which such right is appurtenant acquires by his grant a right to have the servitude or easement, or 'right of amenity,' as it is sometimes called, protected in equity, notwithstanding that his right may not rest on a covenant which, as a matter of law, runs with the title to his land, and notwithstanding that it may

<sup>1</sup> *Bradley v. Walker*, 138 N. Y. 291, 299, 400; *Hobson v. Cartwright*, 93 Ky. 368, 33 N. E. Rep. 1079, per Earl, J. 20 S. W. Rep. 281.

<sup>2</sup> *Peck v. Conway*, 119 Mass. 546, 548, <sup>3</sup> *Condert v. Sayre*, 46 N. J. Eq. 386, per Morton, J.; *Fuller v. Arms*, 45 Vt. 19 Atl. Rep. 190, syllabus by court.



also be true that he may not be able to maintain an action at law for the vindication of his right."<sup>1</sup>

785. A grantor may impose restrictions for the benefit of land already sold as well as that remaining in his hands which he proposes to sell.<sup>2</sup> Although the owner of a lot previously sold could not at law in his own name sue a subsequent purchaser for a violation of a covenant in the grantor's deed to such subsequent purchaser, a court of equity might, in a suit in his own name, afford him protection by injunction.<sup>3</sup>

Where a grantor in selling a riparian estate obligated himself to leave free for the common use of the purchasers a certain space in front thereof between designated limits, without any qualification as to the duration of such obligation, it was held that the privilege or grant was in perpetuity, and that the contract was a covenant which ran with the lands absolutely conveyed, and in favor of the lots sold, whoever the owners might be, to no end of time.<sup>4</sup>

A proviso, in a deed of land to a railroad company for a right of way, that the grantee shall maintain a fence on each side of said right of way is a covenant running with the land, and is binding on the grantee, and on a purchaser of the railroad under foreclosure of a mortgage executed before the land was conveyed, since in taking title to the land it must assume the burdens running with it.<sup>5</sup> But in California it was held that a covenant in a deed of a right of way to a railroad company, that the company should maintain a depot and run daily trains, did not run with the land, because it was not "made for the direct benefit of the property, or some part of it," as required by Civil Code.<sup>6</sup>

<sup>1</sup> *Condert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. Rep. 190, per Van Fleet, V. C.; citing *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Gawtry v. Leland*, 31 N. J. Eq. 385; *Whitney v. Union Ry. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Schworer v. Boylston Market Asso.* 99 Mass. 285; *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218; *Coles v. Sims*, 5 De Gex, M. & G. 1; *Western v. Macdermot*, L. R. 1 Eq. 499, on appeal, L. R. 2 Ch. 72.

<sup>2</sup> *Collins v. Castle*, 36 Ch. D. 243;

*Spicer v. Martin*, 14 App. Cas. 12; *Nottingham Brick Works v. Butler*, 16 Q. B. D. 778; *Payson v. Burnham*, 141 Mass. 547, 6 N. E. Rep. 708; *Barrow v. Richards*, 8 Paige, 351.

<sup>3</sup> *Barrow v. Richard*, 8 Paige, 351, 360, per Chancellor Walworth.

<sup>4</sup> *Delogny v. Mercer*, 43 La. Ann. 205, 8 So. Rep. 903.

<sup>5</sup> *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. Rep. 77; *Toledo, St. L. & C. R. Co. v. Cosand*, 6 Ind. App. 222, 33 N. E. Rep. 251.

<sup>6</sup> *Lyford v. North Pac. C. R. Co.* 92 Cal. 93, 28 Pac. Rep. 103.

A covenant in a deed of certain land with a right of way over an adjoining lane, which is "not to be incumbered or built upon by either party," is a covenant running with the land; and such covenant is not restricted, by the use of the words "either party," to the actual parties to the deed, but applies equally to subsequent grantees.<sup>1</sup>

**786. A covenant that is incident to the property conveyed and affects its value runs with the land and binds a subsequent purchaser.** Thus, where the owner of a dam and water-power granted a certain amount of the water to one who covenanted to pay his ratable share of the expense of keeping in repair the dam and race-way in proportion to the number of square inches of water conveyed to him, it was held that such covenant ran with the estate granted, and was binding upon subsequent owners.<sup>2</sup>

A covenant by a landowner to render to the covenantees one eighth of the lead ore raised by him on the land, in consideration of their constructing a "level" to drain off the water so that the ore might be reached, is a covenant that runs with the land.<sup>3</sup>

A covenant to keep a dam in repair, in a conveyance by the covenantor of land and dam for a new water privilege to be

<sup>1</sup> *Dexter v. Beard*, 130 N. Y. 549, 29 N. E. Rep. 983, affirming 7 N. Y. Supp. 11. For other instances of covenants to repair or maintain fences which have been adjudged to run with the land, see *Kettle River R. Co. v. Eastern Ry. Co.* 41 Minn. 461, 43 N. W. Rep. 469; *Blain v. Taylor*, 19 Abb. Pr. 228; *Easter v. Little Miami R. Co.* 14 Ohio St. 48; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Maxon v. Lane*, 102 Ind. 364; *Kellogg v. Robinson*, 6 Vt. 276; *Bronson v. Coffin*, 108 Mass. 175, 118 Mass. 156; *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154; *Norfleet v. Cromwell*, 64 N. C. 1, 70 N. C. 634.

<sup>2</sup> *Wooliscroft v. Norton*, 15 Wis. 198.

<sup>3</sup> *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. Rep. 545. *Orton, J.*, said: "While the mineral is in the earth, undiscovered and unmined, it has but little or no value. The covenant requiring the grantor to raise or mine, and deliver it to the grantees, gives it value. There is not only privity of estate, but the parties

are tenants in common of all the mineral in the land. The covenantees own one undivided eighth of it, and the covenantor reserved and owns seven eighths of it, and covenants to raise, separate, and deliver the one eighth. The possession of the undivided mineral in the land, by the covenant, remains in the covenantor until it is raised, divided, and delivered. The grant without the covenant would make each party liable to contribute a proportionate share of the labor and expense of raising or mining it. The covenant imposes this burden wholly upon the grantor. . . . It appears to us that the covenant to render one eighth of the mineral to the covenantees, read in connection with the dependent covenant to construct the level for the purpose of making the lead ore in the land available, and the grant of one eighth of such ore in the land, comes within every essential element of one that runs with the land, and binds the present parties."

owned by him and others, runs with the land, as it is connected with the subject of the grant and enters into its value. "As an interest in the land to which the covenants were annexed was transferred, there was privity of estate between the covenanting parties. Although the interest transferred was less than the entire title, and the residue was reserved by the grantor, the covenants were in support of the grant, and related to the beneficial enjoyment of the thing granted. The benefit of the covenants, therefore, passed with the interest transferred to the covenantee, while the burden rested upon the part reserved by the covenantor, and became binding upon whomsoever should at any time own the same."<sup>1</sup>

**787.** A covenant to run with the land must in its nature inure in the land, or grant a right or easement therein. A covenant by a landowner with a railroad company, that he will transport the products of his stone quarry over the company's road, is not a covenant real and does not run with the land. It is merely a traffic agreement.<sup>2</sup> Lord Brougham, speaking of a covenant to take limestone from a particular quarry and to transport it over a particular railroad, said: "If one man may bind his message and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive, for there can be no reason whatever in support of the covenant in question which would not extend to every covenant that can be devised."<sup>3</sup>

<sup>1</sup> *Nye v. Hoyle*, 120 N. Y. 195, 24 N. E. Rep. 1, per Vann, J., citing *Norman v. Wells*, 17 Wend. 136, 146; *Hart v. Lyon*, 90 N. Y. 663; *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400, 408; *Trustees v. Lynch*, 70 N. Y. 440, 450, 26 Am. Rep. 615; *Wilbur v. Brown*, 3 Denio, 356; *Fitch v. Johnson*, 104 Ill. 111; *Manderbach v. Bethany Orphans' Home*, 109 Pa. St. 231, 2 Atl. Rep. 422; *Spencer's Case*, 1 Smith Lead. Cas. 174, 212; *Morse v. Aldrich*, 19 Pick. 449; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335.

<sup>2</sup> *Kettle River R. Co. v. Eastern Ry. Co.* 41 Minn. 461, 43 N. W. Rep. 469. And see *Keppell v. Bailey*, 2 Mylne & K. 517, 535; *West Virginia Transp. Co. v. Ohio River Pipe-Line Co.* 22 W. Va. 600, 626, 46 Am. Rep. 527; *Brewer v. Marshall*, 19 N. J. Eq. 337, 97 Am. Dec. 679; 20 N. J. Eq. 537; *Wiggins Ferry Co. v. Ohio & M. Ry. Co.* 94 Ill. 83.

See, however, *Norman v. Wells*, 17 Wend. 136; *National Union Bank v. Seegur*, 39 N. J. L. 173.

<sup>3</sup> *Keppell v. Bailey*, 2 Mylne & K. 517, 536.

WHEN RESTRICTIVE COVENANTS RUN WITH THE LAND. [§ 788.

A covenant by the grantor of a quarry adjoining his other land that he would not open or work any quarry on such other land, though made for himself, his heirs and assigns, with his grantee and his heirs and assigns, was held not to be of a kind that could be attached to the grantee's land so as to restrict the use of the grantor's other land in all hands for the benefit of whoever might become the owner of it. "Equity will no more enforce every restriction that can be devised," said Mr. Justice Holmes, delivering the judgment to this effect, "than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must 'touch or concern,' or 'extend to the support of the thing' conveyed.<sup>1</sup> They must be 'for the benefit of the estate.'<sup>2</sup> Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden.<sup>3</sup> The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land."<sup>4</sup>

**788.** Though a covenant be made by one for himself and his assigns, yet, if it does not concern the land, his assignee is not bound by it. The covenant in such case is merely collat-

<sup>1</sup> *Spencer's Case*, 5 Rep. 16 a, 24 b.

<sup>2</sup> *Cockson v. Cock*, Cro. Jac. 125.

<sup>3</sup> *Keppell v. Bailey*, 2 Myl. & K. 517,

535; *Ackroyd v. Smith*, 10 C. B. 164;

*Hill v. Tupper*, 2 H. & C. 121.

<sup>4</sup> *Norcross v. James*, 140 Mass. 188, 192, 2 N. E. Rep. 946, per Holmes, J.

§§ 789, 790.] RESTRICTIONS AS TO THE USE OF LAND.

eral.<sup>1</sup> Thus a covenant with a lessee for himself and assigns, not to hire persons to work in the mill demised who were settled in other parishes, was held not to run with the land or bind his assignee.<sup>2</sup> Lord Ellenborough, in giving judgment, said: "This is a covenant in which the assignee is specifically named; and though it were for a thing not *in esse* at the time, yet, being specifically named, it would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affected the mode of enjoying it. But this covenant does not affect the thing demised in one way or the other. . . . How, then, does it affect the mode of occupation? The carrying on of a particular trade on the premises may be said to do that; but where the work to be done is at all events the same, whether it be done by workmen from one parish or another cannot affect the modes of occupation. The covenant, therefore, not directly affecting the nature, quality, or value of the thing demised, nor the mode of occupying it, is a collateral covenant, which will not bind the assignee of the term, though named."

789. It is not essential that the assignees of the covenantor should be named or referred to in order to make the covenant one that will run with the land, provided the intention is clear that future owners of the land should be bound.<sup>3</sup> One having covenanted to leave certain land for pasturage *absque cultura*, granted his estate to another, his executors and administrators, who ploughed the land. In a suit upon the covenant against the assignee, it was demurred that, the assignee not being named, the covenant did not bind him, it being collateral. "But all the court held that this covenant is to be performed by the assignee although he be not named, because it is for the benefit of the estate, according to the nature of the soil; but to build *de novo*, or such like, shall not bind him unless named."<sup>4</sup>

790. On the other hand, a covenant to do something quite unconnected with the land does not bind the assigns though expressly mentioned.<sup>5</sup> Whether it binds his assigns depends

<sup>1</sup> Kettle River R. Co. v. Eastern Ry. Co. 41 Minn. 461, 476, 43 N. W. Rep. 469; Norcross v. James, 140 Mass. 188, 2 N. E. Rep. 946.

<sup>2</sup> Congleton v. Pattison, 10 East, 130, 135, 136.

<sup>3</sup> Wilkinson v. Rogers, 10 Jur. N. S. 5; Morland v. Cook, L. R. 6 Eq. 252; Hodge v. Sloan, 107 N. Y. 244, 251.

<sup>4</sup> Cockson v. Cock, Cro. Jac. 125.

<sup>5</sup> Spencer's Case, 5 Coke, 16 a, 1 Smith's Lead. Cas. 9 Am. ed. 174.

much more upon the nature and purpose of the covenant than upon its form and the use of any particular word. The owner of two adjacent city lots conveyed one of them by a deed which contained this clause: "The said grantor, being also the owner of the adjoining lot, for himself, his heirs, executors, administrators, and assigns, does hereby covenant that he will not erect or cause to be erected on said adjoining lot any building which shall be regarded as a nuisance."<sup>1</sup> It was held that the covenant was against such erection by the grantor alone, and that he is not liable under it for a nuisance erected by his grantee of the adjoining lot, whose conveyance contained no restrictions as to use.<sup>2</sup> "This covenant," say the court, "is purely negative in character, and has no relation to the land conveyed, but relates wholly to other premises owned by the covenantor, and in which the covenantee had no interest. There was no agreement that the premises should not be used for certain purposes, or that they should be free from nuisances forever. There was no corresponding covenant by the grantee restricting the use that he might make of the premises conveyed to him, so that the restrictions might be mutual, and uniformity of use thus secured. No special object to be attained by the covenant is apparent, because both parcels of land were tenement-house property, situated on a back street, and surrounded by buildings of an inferior character. In construing the covenant, it is to be observed that the grantor, although speaking for himself and his successors, to the grantee and his successors, confined the restriction to himself alone by agreeing that he (the grantor) would neither erect nor cause to be erected any building that should be regarded as a nuisance. . . . A personal covenant binds the heirs, executors, and administrators in respect to assets, so that the word 'assigns' only need be rejected, as surplusage in order to relieve the case of all difficulty. A strained construction that has no foundation to rest upon except the single word 'assigns,' used in the descriptive and unsubstantial way already mentioned, should not be resorted to when it involves a serious result to the grantor, with but slight benefit to the grantee, because it is improbable that under such circumstances such a result was intended. Hence, only by the

<sup>1</sup> *Renals v. Cowlshaw*, 9 Ch. D. 125, N. E. Rep. 275, judgment by Mr. Justice Vann, affirming 11 Ch. D. 866.

<sup>2</sup> *Clarke v. Devoe*, 124 N. Y. 120, 26

use of plain and direct language by the grantor should it be held that he created a right in the nature of an easement, and attached it to one parcel as the dominant estate, and made the other servient thereto for all time to come. We think that the language used by the parties permits no such result."

791. The naming of the covenantee's heirs and assigns is of importance as showing an intention that the covenant should run with the land. It shows an intention that the covenant should protect not only the grantee, but also those who should come after him by succession to the ownership of the same land. "The significance of those words," says Mr. Justice Finch, "will better appear if we refer back to the early history of these covenants. Originally the common law did not permit the assignment of things in action, and it followed that a covenant, regarded from the direction of a contract, could not pass beyond the covenantee. But the old warranty seems to have been viewed rather as an incident of, and as belonging to, the estate conveyed, and so attached to that estate as to go with it when transmitted. It could not pass to assigns, as an independent contract, but, by its connection with an estate in land, became transmissible with it. Out of that peculiarity sprang the necessity of privity of estate to enable the subsequent assignee to vouch, or call on his predecessor for protection; but it was an element of the doctrine that neither the heir nor the assign of the grantee could take advantage of the warranty unless expressly named.<sup>1</sup> As was said, if one 'warrant land to a man and his heirs without naming assigns, his assignee shall not vouch.'<sup>2</sup> That rule was not applied when the warrantor, instead of substituting other lands, became bound only to respond in damages; but, while the necessity has disappeared, the actual use of the words continues to indicate the purpose and intent of the warrantor that his covenant shall not stop with the covenantee, but operate for the benefit of his grantees; and though the use of the words, possibly, may not dispense with some privity of estate, they show that the warrantor regarded himself as making, and intending to make, a covenant running with the land, and that, in holding him to that responsibility, we do not put upon him a liability which he did not contemplate."<sup>3</sup>

<sup>1</sup> Rawle, Cov. § 203.

<sup>2</sup> Co. Litt. 384 b.

<sup>3</sup> Mygatt v. Coe, 142 N. Y. 78, 36 N. E. Rep. 870. The learned judge further re-

**792.** By express stipulation of the parties; a covenant which of itself would not run with the land may be made binding as a lien. Thus, although the Code of California provides that a covenant cannot be made to run with the land except where such covenant is made in connection with and as a part of the conveyance or transfer of the land itself, an express agreement that such a covenant shall run with and bind the land is effectual. The contract in question related to the furnishing of water to irrigate land by means of a ditch, and it was provided that the right to the water to be furnished should be and become appurtenant to the land, and this was followed by an express agreement that the contract to pay the money therefor should bind the land. This created a lien upon the land for the enforcement of the covenant, and, when recorded, was notice to subsequent purchasers.<sup>1</sup> The subsequent purchaser held the land subject to the lien, but was not personally liable to pay the debt.

A declaration by the parties that the covenants of a deed shall run with the land is not necessarily controlling on the question whether or not they do. If the covenant is not one of a nature to run with the land, or if it is not one created in a grant of the estate, the declaration of the parties does not make it a covenant running with the land.<sup>2</sup>

**793.** To create a covenant running with the land, it is essential that with the making of the covenant there be a transfer of title from one party to the other,<sup>3</sup> unless there is the equiv-

marks that, while these words are more important, and bear more heavily upon the theory that a covenantor having no estate may, by his own special and intended contract, attach his covenant of warranty to the estate of another so as to run with that estate, yet they are entitled to weight and consideration, also, upon the narrower inquiry whether the defendant in the case in hand is or is not to be deemed an entire stranger to the title. And see *Nye v. Hoyle*, 120 N. Y. 195, 203, 24 N. E. Rep. 1; *Coleman v. Bresnahan*, 54 Hun, 619, 8 N. Y. Supp. 158; *Hart v. Lyon*, 90 N. Y. 663.

<sup>1</sup> *Fresno Canal, &c. Co. v. Dunbar*, 80 Cal. 530, 22 Pac. Rep. 275.

<sup>2</sup> *Fresno Canal, &c. Co. v. Rowell*, 80 Cal. 114, 22 Pac. Rep. 53

<sup>3</sup> *Spencer's Case*, 5 Coke, 16 a; *Bally v. Wells*, 3 Wils. 29; *Webb v. Russell*, 3 T. R. 393; *Vyryan v. Arthur*, 1 Barn. & C. 410; *Keppell v. Bailey*, 2 Mylne & K. 517; *Fresno Canal, &c. Co. v. Rowell*, 80 Cal. 114, 22 Pac. Rep. 53; *Dexter v. Beard*, 130 N. Y. 549, 29 N. E. Rep. 983, affirming 7 N. Y. Supp. 11; *Indianapolis Water Co. v. Nulte*, 126 Ind. 373, 26 N. E. Rep. 72; *Conduitt v. Ross*, 102 Ind. 166; *Wells v. Benton*, 108 Ind. 585, 8 N. E. Rep. 444, 9 N. E. Rep. 601; *Hurd v. Curtis*, 19 Pick. 459; *Morse v. Aldrich*, 19 Pick. 449, 1 Met. 544; *Wheelock v. Thayer*, 16 Pick. 68; *Easter v. Little Miami R. Co.* 14 Ohio St. 48; *Wheeler v. Schad*, 7 Nev. 204.

See further, as to covenants running with the land, CH. XXIII.



alent of a grant of an easement or servitude, which may attach to the possession of the land and run with it, regardless of any change of ownership.<sup>1</sup> "Where one party covenants with another in respect of land, and at the same time, with and as a part of making the covenant, neither parts with or receives any title or interest in the land, nor creates an easement, or a right in the nature of an easement, for the benefit of the land, such a covenant is at best but a mere personal contract."<sup>2</sup> Thus, where a contract in no way connected with the title was made between two persons, whereby one of them agreed that no one should be allowed to erect a grist-mill on a water-privilege belonging to him, inasmuch as no interest in the land was transferred, the covenant was merely a personal contract, which did not burden the land in the hands of a subsequent grantee.<sup>3</sup> In another case, the owner of two adjoining lots, in the deed conveying one of them, covenanted for himself, his heirs, executors, administrators, and assigns, that he would not erect on the lot remaining unsold any building which should be regarded as a nuisance. The covenant had no relation to the land conveyed, but referred wholly to premises with reference to which neither party parted with or received any title or interest at the time of, and as a part of making the covenant. It was, then, a mere personal covenant, not binding on a subsequent grantee of such premises. The question presented, therefore, was whether this personal covenant rendered the covenantor liable to respond for the acts of subsequent grantors, as well as his own, or only for his own; and the court held that the grantor only intended to contract against his own acts, and the covenant should not be read distributively, as if the grantor had covenanted that he would not erect a structure which should be regarded as a nuisance, nor would his executors, administrators, or assigns.<sup>4</sup>

In another case in New York,<sup>5</sup> Chief Justice Follett, rendering

<sup>1</sup> *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Weyman v. Ringold*, 1 Bradf. Sur. 40, 54; *Kettle River R. Co. v. Eastern Ry. Co.* 41 Minn. 461, 43 N. W. Rep. 469.

<sup>2</sup> *King v. Wight*, 155 Mass. 444, 29 N. E. Rep. 644, per Morton, J., citing *Savage v. Mason*, 3 Cush. 500; *Morse v. Aldrich*, 19 Pick. 449; *Bronson v. Coffin*,

108 Mass. 175, 11 Am. Rep. 335, 118 Mass. 156; *Norcross v. James*, 140 Mass. 190, 2 N. E. Rep. 946.

<sup>3</sup> *Harsha v. Reid*, 45 N. Y. 415.

<sup>4</sup> *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. Rep. 275.

<sup>5</sup> *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. Rep. 611. Upon a second appeal of this case, new facts appeared, so that the

the judgment of the Second Division of the Court of Appeals, examined at length the doctrine that privity of estate is not essential to the making of a covenant that will run with the land. "This opinion has been founded almost exclusively upon the authority of an ancient case known as the 'Prior's Case,'<sup>1</sup> cited by Lord Coke. In controverting this view, Sir Edward Sugden, now Lord St. Leonards, has subjected the Prior's Case to a most searching criticism, which results in its complete overthrow as authority on this question, showing that the portions of it particularly relied on were not judicial resolutions, but an addition by the reporter; that the case does not contain the doctrine usually extracted from it; and that it has received no confirmation, but the contrary, from subsequent adjudications. It may be safely laid down that, if the doctrine that the covenants for title will run with the land, even when entered into by a stranger to the land, has no better foundation than the authority of this case, it cannot be sustained; and it would seem to be the better opinion that, in order for a covenantor's covenants to run with the land, he must also be a grantor of the land which they affect. No modern case decides that a stranger's covenants may run with the land; but in a dictum of Moncure, J., in the recent case of *Dickinson v. Hoomes*,<sup>2</sup> this doctrine is broadly enunciated. . . . In the American Law Review<sup>3</sup> Judge Hare's note is discussed, and the writer, in conclusion, says: 'But the authority of Pakenham's Case seems to be overthrown by the investigations of Sugden and Washburn, who produce unquestionable proof that the case was not decided by the court as reported by Lord Coke, but that Lord Coke's report was the expression of a mere dictum by Finchden.' . . . The editor of the ninth American edition of Smith's Leading Cases (vol. i. p. 211) takes a different view of this question from the one taken in the earlier editions. He says: 'It seems that there must be between covenantor and covenantee the relation of grantor and grantee, which is all that there is between the grantee and his assignee. It is not thought that a covenant of warranty made by a stranger to the land would run

First Division of the Court of Appeals reversed the decision above referred to on other points. The doctrine that a stranger to the title cannot make a covenant that will run with the land was recognized.

*Mygatt v. Coe*, 142 N. Y. 78, 36 N. E. Rep. 870.

<sup>1</sup> Y. B. 42 Edw. III.

<sup>2</sup> 8 Gratt. 353, 406.

<sup>3</sup> Vol. 20, p. 404.

with it, and perhaps the relation necessary to exist is that which would have constituted privity of estate at common law before the statute of *quia emptores*, although the rent or services reserved, which were perhaps an incident of the old privity, are not now usual.' "

794. There are two classes of covenants that are annexed to the land and follow it into the hands of heirs and assignees. The one class, represented by the usual covenants for title, runs only with the estate in the land. The other class, represented by equitable covenants, is attached to the land itself and follows the possession of the land. Lord Coke thus stated the distinction: "So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land."<sup>1</sup> Mr. Justice Holmes, stating this distinction, says: "Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and, from a very early date down to comparatively modern times, lawyers have been perplexed with the question how an assignee could sue upon a contract to which he was not a party. But an heir could sue upon a warranty to his ancestor, because for that purpose he was *eadem persona cum antecessore*. And this conception was gradually extended in a qualified way to assigns, where they were mentioned in the deed. But in order that an assignee should be so far identified in law with the original covenantor, he must have the same estate, that is, the same status or inheritance, and thus the same *persona*, *quoad* the contract. The privity of estate which is thus required is privity of estate with the original covenantor, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books. . . . On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired, were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor. 'So a disseisor, abator, intruder, or the lord by escheat, etc., shall have them as things annexed to the land.'<sup>2</sup> In like manner, when, as was usual, although not invariable, the duty was re-

<sup>1</sup> Chudleigh's Case, 1 Rep. 120 a, 122 b.

<sup>2</sup> Chudleigh's Case, 1 Rep. 120 a, 122 b.

garded as falling upon land, the burden of the covenant or grant went with the servient land into all hands, and of course there was no need to mention assigns. . . . When it is said that in this class of cases there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or quasi easement, or must be in aid of such a grant;<sup>1</sup> which is generally true, although, as has been shown, not invariably,<sup>2</sup> and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression 'privity of estate' in this sense is of modern use, and has been carried over from the cases of warranty, where it was used with a wholly different meaning."<sup>3</sup>

**795. Restrictions in the nature of easements may be created by agreement or indenture between owners who have already acquired their lands.** "In order to attach the easement to the dominant estate, it is not necessary that it should be created at the moment when either the dominant or the servient estate is conveyed, if the purport of the deed is to create an easement for the benefit of the dominant estate."<sup>4</sup>

On this ground was sustained a covenant by a railroad company with the owner of adjoining land to maintain a side track and depot at a particular point.<sup>5</sup>

"The character of a covenant of this kind must depend upon the effect of the entire agreement of which it is a part, and, where the benefit and the burden are so inseparably connected that each is necessary to the existence of the other, both must go together. The liability to the burden will be a necessary incident to the right to the benefit."<sup>6</sup> Therefore an agreement under seal between riparian owners adjusting their respective rights to

<sup>1</sup> *Bronson v. Coffin*, 108 Mass. 175, 185, 118 Mass. 156.

<sup>2</sup> *Pakenham's Case*, Y. B. 42 Edw. III. 3, Pl. 14.

<sup>3</sup> *Norcross v. James*, 140 Mass. 188, 189, 191, 2 N. E. Rep. 946.

<sup>4</sup> *Ladd v. Boston*, 151 Mass. 585, 24 N. E. Rep. 858, 21 Am. St. Rep. 481, per Holmes, J., citing *Louisville & N. R. Co. v. Koelle*, 104 Ill. 455; *Wetherell v. Brobst*, 23 Iowa, 586, 591. And see *Costigan v.*

*Pennsylvania R. Co.* 54 N. J. L. 233, 23 Atl. Rep. 810.

<sup>5</sup> *Pitkin v. Long Island R. Co.* 2 Barb. Ch. 221, 47 Am. Dec. 320; *Gilmer v. Mobile & M. Ry. Co.* 79 Ala. 569, 58 Am. Rep. 623.

<sup>6</sup> *Horn v. Miller*, 136 Pa. St. 640, 655, 20 Atl. Rep. 706, per Clark, J. And see *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641; *Carr v. Lowry*, 27 Pa. St. 257.

the waters of the stream, and entered into for the mutual benefit of their respective heirs or grantees, runs with the lands of the respective proprietors, and it is of no consequence that in subsequent deeds of the lands no mention of the agreement is made.<sup>1</sup>

Where a landowner, desiring to build a dam and raise the water of a stream over which there was a bridge and highway, covenanted with the town to keep in repair a new bridge and its approaches, being part of a highway, such covenant may run with the land so as to bind the covenantor's successors in title.<sup>2</sup>

**796. A restriction which is merely a personal covenant with the grantor can be enforced by him only.** In a deed of land bounded on a street there was a restriction that no building should be placed within a certain distance from the street; but there was nothing in the deed to show that the parties intended that the restriction should create a servitude or easement on the granted land, which should attach to and be an appurtenance to any neighboring land. The court held that the restriction was merely a personal covenant with the grantor which his heirs could not enforce after his death. The mere fact that the grantor owned other land separated only by a railroad from the land conveyed does not show that the object of the restriction was to benefit this land. "In the absence of any words in the deed to this effect, or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate. For anything that appears, it may have been intended only for the benefit of the grantor and for his personal convenience."<sup>3</sup>

An agreement whether oral or in writing between the owners of adjoining lots of land simply to erect buildings in a uniform manner and at a certain distance from the street does not create

<sup>1</sup> *Horn v. Miller*, 136 Pa. St. 640, 20 Atl. Rep. 706.

<sup>2</sup> *Middlefield v. Church Mills Knitting Co.* 160 Mass. 267, 35 N. E. Rep. 780. "It is true that, in general, active duties cannot be attached to land, and that affirmative covenants only bind the covenantor, his heirs, executors, and administrators. But there are some exceptions, and most conspicuous among them is the

obligation to repair fences and highways." Per Holmes, J.

<sup>3</sup> *Skinner v. Shepard*, 130 Mass. 180, 181, per Morton, J. For other instances of restrictions which were construed as personal covenants only, see *Badger v. Boardman*, 16 Gray, 559; *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Lowell Inst. Sav. v. Lowell*, 153 Mass. 530, 27 N. E. Rep. 518; *Mitchell v. Leavitt*, 30 Conn. 587.

WHEN RESTRICTIVE COVENANTS RUN WITH THE LAND. [§ 797.

any perpetual restraint on the use of the land by either of them. It is completely satisfied when the buildings are erected in accordance with the agreement, and there is no implication that they shall thereafter remain in the same position or of the same size or shape.<sup>1</sup>

797. A permanent restriction as to the use of land will not be implied from an independent agreement between adjoining owners. While such an agreement may create a right in the nature of a servitude or easement which can be enforced in equity, although it does not run with the land by virtue of a privity of estate between the parties, yet it must appear by express stipulation or unavoidable implication that the parties intended to impose a permanent restriction on the use of their respective estates. "If such restrictions should be incorporated into a grant in the form of a condition or reservation, or appended to it as a covenant real, or so inserted as to carry with it a notice to all persons claiming title in the premises that the free use and enjoyment of them is to a certain extent qualified or limited, the intent to create a servitude or privilege in its nature perpetual would be clearly manifested. But where the agreement for such a right or interest in real property rests wholly in parol, or is in the form of a covenant in gross, or is entered into by a written contract separate and distinct from the deed or instrument by which the title is passed, it must contain a stipulation which in express terms provides that the right or privilege is to be a permanent restriction on the land to which it relates, or it must be so framed as to lead to the unavoidable conclusion that such was the intention of the parties; otherwise it would be destitute of the essential element of a servitude or easement designed as a perpetual burden on one estate for the use and benefit of another, and would be nothing more than an agreement for the immediate and present mode of enjoying or using the property, having relation to its situation and con-

<sup>1</sup> *Hubbell v. Warren*, 8 Allen, 173, 179. Bigelow, C. J., said: "Neither in law nor in equity could any design or purpose be imputed to the parties beyond that which was clearly expressed or necessarily implied from the agreement into which they had entered. The presumption of law as well as of sound reason would be in such case that the parties did not intend to

give greater permanence to the prescribed mode of occupying their land than might be secured by the nature of the structures which were about to be erected on the premises; and, if they were of a solid and durable character, that the owners would not be likely to change them essentially for a long period of years."

dition, and the purpose to which it was to be appropriated at the time when the agreement was made."<sup>1</sup>

**798.** Whether the covenant is personal, or is for the benefit of the adjacent land, is a question of intention, to be determined from the words of the deed, from the circumstances of the conveyance, and from the situation of the property at the time. It will be regarded as personal merely unless an intention to the contrary appears or may be presumed. If the adjoining land belongs to the covenantee, and is manifestly benefited by the restriction, there may be a presumption that it was intended for the benefit of that land.<sup>2</sup> But the restriction will be regarded as personal to the covenantee, and will not pass by transfer of the land unless there is something to indicate an intention that the restriction be attached to the land. Thus, where a deed contains a condition that no building shall ever be erected on the land, and there is nothing to indicate that the condition is intended to be attached to the adjoining land and to pass with it, a purchaser of such land cannot enforce it. "An easement or servitude of this description," said Mr. Justice Allen, "ought not to be held to be imposed for the benefit of an adjacent lot of land, in the absence of any words in the grant itself implying it, unless the circumstances and situation at the time of the grant were such as to make it manifest that the condition or restriction or reservation was intended to be for the benefit of such adjacent lot and to be annexed to it as an appurtenance."<sup>3</sup>

A stipulation in a deed poll, that the grantee, his heirs and assigns, shall make and maintain a fence between the granted land and that of the grantor, is not a covenant that runs with the land, but only a personal obligation of the grantee implied from his acceptance of the deed. Such a stipulation will not sustain an action by a subsequent purchaser from the grantor of his adjoining land against a purchaser from the grantee in the deed poll.<sup>4</sup>

<sup>1</sup> *Hubbell v. Warren*, 8 Allen, 173, 178, 724, per Bramwell, J.; *Keates v. Lyon*, 4 Ch. App. 218.

<sup>2</sup> *Renals v. Cowlishaw*, 9 Ch. D. 125; *Peck v. Conway*, 119 Mass. 546; *Tobey v. Moore*, 130 Mass. 448.

<sup>3</sup> *Lowell Inst. for Savings v. Lowell*, 153 Mass. 530, 533, 27 N. E. Rep. 518. And see *Master v. Hansard*, 4 Ch. D. 718, 724, per Bramwell, J.; *Keates v. Lyon*, 4 Ch. App. 218.

<sup>4</sup> *Kennedy v. Owen*, 136 Mass. 199. Allen, J., said: "It is plain that an agreement not under seal cannot, technically speaking, run with the land," following *Parish v. Whitney*, 3 Gray, 516, and *Martin v. Drinan*, 128 Mass. 515. In *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am.

**799.** A party-wall agreement in the usual form between adjoining land-owners runs with the land. Thus, an agreement under seal between adjoining lot-owners, for themselves, their heirs and assigns, acknowledged and recorded, and providing that either party may build a party-wall, one half on the land of each, and that whenever the other party uses the wall so built he or she shall pay one half the cost of its erection, is a covenant running with each lot. Such an agreement creates an easement of use and support in favor of each lot-owner and his successors in title in the half of the wall which stood on the other lot, and in the land under the same. Each lot of land becomes entitled, therefore, to the benefits and subject to the burdens arising from the covenants contained in the agreement, and relating to the erection and maintenance of the wall. They inhere in and belong to it.<sup>1</sup> If the original owner and party to the covenant does not use the wall, but conveys his land to one who does use it, the original owner is not liable on the covenant, but his grantee is the party liable upon it.<sup>2</sup> The burden as well as the benefit of the covenant passes with the land.<sup>3</sup> The grantee of the covenantor is personally liable on such covenant running with the land, if he is the first to use the wall.<sup>4</sup> A grantee not using the wall is not

Dec. 633, and *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550, such an agreement was held to run with the land. In *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, a covenant by the grantor that he would maintain a fence between the land granted and his remaining land, with a provision that the covenant should be perpetual and obligatory upon subsequent owners, was held to run with the land.

See *Hodge v. Sloan*, 107 N. Y. 244; *Bowen v. Beck*, 94 N. Y. 86; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Georgia So. R. Co. v. Reeves*, 64 Ga. 492; *Maynard v. Moore*, 76 N. C. 158; *Norfleet v. Cromwell*, 64 N. C. 1.

<sup>1</sup> *King v. Wight*, 155 Mass. 444, 29 N. E. Rep. 644, per Morton, J.; *Richardson v. Tobey*, 121 Mass. 437, 459, 23 Am. Rep. 283; *Savage v. Mason*, 3 Cush. 500; *Maine v. Cumston*, 98 Mass. 317; *Standish v. Lawrence*, 111 Mass. 111; *Jordan v. Kraft*, 33 Neb. 844, 51 N. W. Rep. 286; *First Nat. Bank v. Security Bank*

(Minn.), 63 N. W. Rep. 264; *Warner v. Rogers*, 23 Minn. 34; *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. Rep. 702; *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433; *Hagerty v. Lee*, 54 N. J. L. 580, 25 Atl. Rep. 319, 26 Atl. Rep. 537; *Conduitt v. Ross*, 102 Ind. 166; *Thomson v. Curtis*, 28 Iowa, 229; *Weill v. Baldwin*, 64 Cal. 476; *Platt v. Eggleston*, 20 Ohio St. 414. In New York, however, the covenant is considered a personal one, and does not run with the land. *Hart v. Lyon*, 90 N. Y. 663; *Scott v. McMillan*, 76 N. Y. 141; *Cole v. Hughes*, 54 N. Y. 444.

<sup>2</sup> *Jordan v. Kraft*, 33 Neb. 844, 51 N. W. Rep. 286.

<sup>3</sup> *First Nat. Bank v. Security Bank* (Minn.), 63 N. W. Rep. 264; *Shaber v. St. Paul Water Co.* 30 Minn. 179, 14 N. W. Rep. 874; *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. Rep. 702.

<sup>4</sup> *First Nat. Bank v. Security Bank* (Minn.), 63 N. W. Rep. 264. And see



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liable to a personal judgment on the covenant, but this creates an equitable lien or charge upon the land, and the only remedy, aside from the personal liability of the party using the wall, is a judgment to enforce such lien.

The term "using the wall" in the ordinary party-wall agreement means making use of it in the process of constructing a building on the adjoining lot; and the owner who constructs such building is the person who uses the wall. Neither his grantee nor mortgagee is personally liable, as assignee of the covenant, for a use of the wall made by his grantor or mortgagor.<sup>1</sup>

800. A party-wall covenant between adjoining owners does not run with the land when there is no privity of estate between them; as where one such owner covenants with the other that whenever he or his heirs or assigns should use the wall he or they would pay the other who should build the wall, or his assigns, the value of the part of such wall which he or they might use. After the land has passed to another who has used the wall, he is not liable to an action brought by the grantee of the party who built the wall; but an assignee of the contract might recover upon it. There was only a privity of contract between the original covenantors without any privity of estate; and therefore neither the benefit nor the burden of the covenant ran with the land to which it related.<sup>2</sup>

801. Covenants running with the land inure to the covenantee's mortgagee and grantees, both, in proportion to their rights; and a purchaser at the foreclosure sale can sue the covenantor as a privy in estate. To whom the covenants run, as between the mortgagee on the one hand and the grantee of the mortgagor on the other, has been sometimes a difficult and troublesome question, and logically is so yet, although now substantially settled. "Under the old system, which regarded the mortgage as transferring to the mortgagee the entire legal estate, leaving in the mortgagor only an equity which courts of law could not recognize, it was necessary to say, and was said, that the covenants running with the land followed the legal estate into the

*Fresno Canal, &c. Co. v. Rowell*, 80 Cal. 114, 22 Pac. Rep. 53.

<sup>1</sup> *Pfeiffer v. Matthews*, 161 Mass. 487, 37 N. E. Rep. 571.

<sup>2</sup> *Cole v. Hughes*, 54 N. Y. 444, 13 Am.

Rep. 611; *Scott v. McMillan*, 76 N. Y. 144; *Nye v. Hoyle*, 120 N. Y. 195, 24 N.

E. Rep. 1. See *Weld v. Nichols*, 17 Pick. 538.

hands of the mortgagee, where they remained entire and complete; and the grantees of the equity, having no legal estate, could have no right to the covenants, which already belonged to another.<sup>1</sup> But the injustice of the doctrine drew upon the ingenuity of equity to supply a remedy; and where the grantee holding covenants had executed a mortgage, and thereafter, having been evicted from the premises by a paramount title, his grantor and covenantor settled with the mortgagee by paying the mortgage, in full discharge of the covenants, and so assuming to cancel them, the grantee was allowed by a decree in equity to sue the covenantor at law, and the latter was restrained from setting up as a defence in any manner the deed or deeds of mortgage which had diverted the covenants from the main line of succession.<sup>2</sup> By this circuitous route the just result was reached of dividing the benefit of the covenants between mortgagee and owner of the equity of redemption according to their respective rights, and the same just distribution is effected under our system by a different process. We regard the mortgagor as retaining the legal estate, and the mortgagee as having a lien upon it for his security. The covenants therefore run to both mortgagee and grantee of mortgagor in proportion to their respective rights, and the covenant is divisible accordingly."<sup>3</sup>

*V. Waiver and Release of Restrictions.*

802. A waiver or abandonment of a restriction may be shown by the subsequent conduct of the grantor with reference to the adjoining property for the benefit of which the restriction was imposed. Thus, where the owner of land laid it out in lots intended for residences only, and sold a lot with the restriction that it should not be used for any purpose other than that of erecting a dwelling-house upon it, but afterwards sold the other lots without any restriction whatever, it was held that he had put it out of his power to carry out his plan of using the property for

<sup>1</sup> It was so held in *Carlisle v. Blamire*, 8 East, 487.

<sup>2</sup> *Thornton v. Court*, 3 De Gex, M. & G. 293.

<sup>3</sup> *Mygatt v. Coe*, 142 N. Y. 78, 88, 36 N. E. Rep. 870, per Finch, J. A very

clear exposition of this doctrine will be found in *White v. Whitney*, 3 Metc. 81, 87, and it has been asserted in *Town v. Needham*, 3 Paige, 546, 24 Am. Dec. 246, and *Andrews v. Wolcott*, 16 Barb. 21, 25.

residences only, and a court of equity will not aid him in enforcing the restriction.<sup>1</sup>

A grantor who has sold a lot of land with a restriction against the use of the land for the sale of intoxicating liquors, and has afterwards sold an adjoining lot without such restriction, will not be allowed to insist upon the restriction in the first deed; for by selling such adjoining lot without the restriction he diminishes the value of his former grantee's property. There should also be some mutuality in such a provision.<sup>2</sup> If a grantor, after making such a restriction, consents to the sale of intoxicating liquors by another in the same village, such consent may be considered as a waiver of the condition for its non-sale attached to other lands in the village.<sup>3</sup>

The grantor's failure to perform a covenant may excuse a failure of his grantee to perform a covenant; as, where a grantor covenanted to pave the streets adjoining the land conveyed, his failure to keep the covenant was held to excuse the purchaser from compliance with his covenant to build on the land within a specified time.<sup>4</sup>

**803.** Where two persons are bound to each other by different covenants made at the same time, a breach by one party of his covenant does not necessarily extinguish the covenant of the other. Much depends upon the form of the action. Where a purchaser is before the court resisting an attempt by his grantor to compel him to abide by the strict letter of his covenant, it is undoubtedly "the right of the court, as well as its duty, to look at the conduct of the parties to the litigation, and also at the conduct of their predecessors in right and duty, to see how they had dealt with each other in respect to the covenant, and also to contrast the condition of the property when the litigation arose with its condition when the covenant was made, and then either decree or deny specific performance, as should appear to be most in accordance with justice and right under all the circumstances of the case." But the case is quite different where a purchaser is before the court in advance of a breach asking to be relieved from the obligation of his covenant. Even if reasons existed which might

<sup>1</sup> *Duncan v. Central Ry. Co.* 85 Ky. 525, 4 S. W. Rep. 228.

<sup>2</sup> *Jenks v. Pawlowski*, 98 Mich. 110, 56 N. W. Rep. 1105.

<sup>3</sup> *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 42 N. W. Rep. 532.

<sup>4</sup> *McConaghy v. Pemberton*, 168 Pa. St. 121, 31 Atl. Rep. 996.

induce a court of equity to decline to specifically enforce a covenant, it does not follow that the court would, in advance of a breach of the covenant, declare it to be a nullity in a suit instituted by the covenantor.<sup>1</sup>

804. If the grantor releases one purchaser from a restriction he cannot himself come into equity to enforce the same restriction against other purchasers, though one purchaser entitled to the benefit of it may enforce it against another who is bound by it. He cannot take away the benefit of his general plan from one purchaser and enjoin a breach of it by another, though he may have a claim for damages at law for such breach by another. "It is not a question of mere acquiescence," said Lord Eldon, "but in every instance in which the grantor suffers grantees to deviate from a general plan, intended for the benefit of all, he deprives others of the right which he had given them to have the general plan enforced for the benefit of all. In such cases I have always understood this court will leave the parties to their remedy at law."<sup>2</sup> So, if a grantor permits material breaches of a covenant to be committed by some purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant. If the grantor is entitled to any remedy it can only be the damages which he may obtain in an action at law.<sup>3</sup> The grantor is equally barred of his remedy though the purchaser against whom he seeks to enforce the covenant bought his land and made his covenant after the breaches by the other purchasers had been committed.<sup>4</sup>

The Duke of Bedford, being the owner of all the property in the neighborhood of the British Museum, for the protection of his other property took covenants from the purchasers and lessees of any part of this property restricting them from building otherwise than in a particular way. But he afterwards himself built upon a large part of the property, which was originally intended not to be built upon, and, having so built, he asked the court of equity to restrain persons from building contrary to their covenants. But the court refused to grant an injunction, on

<sup>1</sup> *Coudert v. Sayre*, 46 N. J. Eq. 386, 399, 19 Atl. Rep. 190, per Van Fleet, V. C.

<sup>2</sup> *Peek v. Matthews*, L. R. 3 Eq. 515. See *Child v. Douglas, Kay*, 560, 572.

<sup>4</sup> *Peek v. Matthews*, L. R. 3 Eq. 515.

<sup>3</sup> *Roper v. Williams*, Turn. & R. 18, 22, a case of landlord and tenant.

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the ground that the grantor had so altered the property since requiring these covenants, by building houses contrary to the provisions of the covenants, that it would be inequitable to give him the benefit of covenants which he himself had treated as absolutely void. He was left to his remedy at law.<sup>1</sup>

**805.** It may be shown that a covenant has become obsolete and inoperative by reason of non-observance and acquiescence by the covenantee entitled to enforce it.<sup>2</sup> He will not lose his rights, however, unless the breach is patent and has continued for a considerable time. A delay to bring action for a few months will not ordinarily bar one of his rights.<sup>3</sup>

But acquiescence in a breach of the restrictive covenant is not shown by failure to take proceedings against the first purchaser who has built upon his land in violation of the restriction.<sup>4</sup>

The extent of the breach is to be considered in determining whether there has been an acquiescence which will bar a covenantee.<sup>5</sup> Breaches that are immaterial in extent, though committed by the covenantor himself, will not bar him from enforcing the covenant.<sup>6</sup>

**806.** A person entitled to the benefit of restrictions may enforce one of them and not another, or may enforce them against one violator and not against another. Where a restriction has been imposed upon several lots of land, the fact that it is violated by the owners of some of the lots is no defence in favor of any one violator against his immediate neighbor who has observed the covenant, and who objects to his manner of breaking it. Thus, where the restriction was for the purpose of protect-

<sup>1</sup> *Bedford v. British Museum*, 2 Myl. E. Rep. 905; *Page v. Murray*, 46 N. J. & K. 552. See, also, *Sayers v. Collyer*, 24 Ch. D. 180.

<sup>2</sup> *Bedford v. British Museum*, 2 Myl. & K. 552; *Sayers v. Collyer*, 24 Ch. D. 180, 28 Ch. D. 103, where there had been a patent and continuous breach for three years before action brought; *Reynolds v. Cleary*, 61 Hun, 590, 16 N. Y. Supp. 421; *Trustees v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. Rep. 303; *Shriver v. Shriver*, 86 N. Y. 575, 584, 585; *Aldrich v. Bailey*, 8 N. Y. Supp. 435; *Fleming v. Burnham*, 100 N. Y. 1, 2 N.

<sup>3</sup> *Mitchell v. Steward*, L. R. 1 Eq. 541; *Coles v. Sims*, 5 De G., M. & G. 1.

<sup>4</sup> *Child v. Douglas, Kay*, 560; *Lloyd v. London, &c. Ry. Co.* 2 De G., J. & S. 578; *German v. Chapman*, 7 Ch. D. 271; *Jackson v. Winniffrith*, 47 L. T. 243.

<sup>5</sup> *Bedford v. British Museum*, 2 Myl. & K. 552; *Kemp v. Sober*, 1 Sim. N. R. 517; *Roper v. Williams*, T. & R. 18; *Richards v. Revitt*, 7 Ch. D. 224. And see *Lloyd v. London, &c. Ry. Co.* 2 De G., J. & S. 580.

<sup>6</sup> *Western v. Macdermot*, L. R. 2 Ch. 72.

ing and preserving the neighborhood for residences, a purchaser of a lot who is using it as a residence and has never violated the agreement himself, or consented to, or authorized or encouraged its violation by others, in order to have the benefit of the agreement is not obliged to sue all its violators at once. He may proceed against them *seriatim*, or he may take no notice of the violations of the agreement by business carried on remotely from his residence, and enforce it against a business specially offensive to him by its proximity.<sup>1</sup>

In an action by a grantor to restrain a grantee from using the property for a saloon or for the sale of intoxicating liquors, under a parol agreement, which was a part of the consideration for the grant, that no part of the premises should be used for such purposes, the fact that the grantor had permitted a druggist who occupied a store on the premises, and had a package license, to sell intoxicants in packages, but not to be drunk on the premises, would not prevent the grantor from obtaining relief.<sup>2</sup>

**807. The original owner who imposed restrictions for the benefit of subsequent purchasers cannot release them as against purchasers of lots entitled to the advantages of the restrictions.<sup>3</sup>** Thus, where a conveyance to a land company of a tract of land to be divided and sold for building purposes provided that no land should be sold or leased by the company without a pledge from the grantee or lessee that the design of the buildings to be erected should be approved by the directors, it was held that the restriction was for the benefit of all who might become grantees of the company, even after the company had subsequently obtained a release of the restrictions as to a lot reserved by the grantor. But a condition in the conveyance that no land should be conveyed without a pledge by the grantee "to build speedily" is for the benefit of the grantor and the company only; and when the grantor subsequently releases such condition as to

<sup>1</sup> Rowland v. Miller, 139 N. Y. 93, 34 N. E. Rep. 765, per Earl, J.; Payson v. Burnham, 141 Mass. 547, 6 N. E. Rep. 708; Jackson v. Stevenson, 156 Mass. 496, 31 N. E. Rep. 691, 32 Am. St. Rep. 476.

<sup>2</sup> Hall v. Solomon, 61 Conn. 76, 23 Atl. Rep. 876.

<sup>3</sup> Western v. Macdermot, L. R. 1 Eq. 499; Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. Rep. 130. "One person is without the least power or capacity, in the absence of a delegation of power, to release or change the rights of another in land." Per Van Fleet, V. C.

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the lot reserved by him, the company could extend to purchasers the time for building.<sup>1</sup>

808. A restriction imposed alike upon all the lots of a block or tract of land cannot be released to one purchaser or his grantee without the assent of the other purchasers, or their grantees, for whose benefit it was imposed. It can be released only by the assent of all the purchasers or owners of lots for whose benefit it was imposed.<sup>2</sup>

A part of the abutters upon a common passageway cannot release an infringement of a stipulation, the legal effect of which was to provide for a passageway to be kept open to the sky.<sup>3</sup> Doubtless such an infringement might be released by a release executed by all the persons entitled to the use of the passageway, but it might be a question whether the rights of the public, in a passageway opening at both ends into public streets and intended for general and public use, could be ignored.<sup>4</sup>

809. Where a restriction provides that changes may be made with "the consent in writing of the grantor, his heirs or assigns," the consent required is that of the grantor or his successors in title while he or they remain owners of the original estate or any considerable part of it, and the consent of all purchasers and lessees of the grantor is not required. The estate in this case was a large one, called the Branksome Estate. At the time of the conveyance in which this restriction was made, a considerable part of the estate had been conveyed and built over. It was not contended that the word "assigns" referred to prior purchasers. "It is said, however, that any subsequent lessee or purchaser of a plot is an assign, within the meaning of the term as used in the covenant, and that his consent in writing is necessary. But it would be very curious if this were so, — that the consent of every subsequent lessee or purchaser of a plot would have to be obtained, though the previous lessees or purchasers of plots need not be consulted at all."<sup>5</sup>

<sup>1</sup> Peabody Heights Co. v. Willson (Md.), 32 Atl. Rep. 386.

<sup>2</sup> Hopkins v. Smith, 162 Mass. 444, 38 N. E. Rep. 1122.

<sup>3</sup> Hopkins v. Smith, 162 Mass. 444, 38 N. E. Rep. 1122; Rice v. Boston & W. R. Co. 12 Allen, 141; Trask v. Wheeler, 7 Allen, 109; Guild v. Richards, 16 Gray, 309.

<sup>4</sup> Attorney-General v. Williams, 140 Mass. 329, 2 N. E. Rep. 80, 3 N. E. Rep. 214, 54 Am. Rep. 468.

<sup>5</sup> Everett v. Remington, 3 Ch. [1892] 148, 159. "Cases of difficulty," said Romer, J., "were suggested on behalf of the plaintiff, — as, for instance, whose consent would be necessary if the Durrant

810. A covenant may be discharged through the taking of the land for a public use by right of eminent domain. Thus, where a railway company, under its compulsory powers, took land which was subject to a covenant not to build thereon, and built a station upon it, it was held that the covenantor was discharged from his covenant by the act of Parliament which compelled him to part with his land, and so deprived him of his power to perform the covenant. It was immaterial whether the railway company was compelled to build its station upon the land, or was only empowered to do so.<sup>1</sup>

811. There may be such a change in the condition of adjacent property and the character of its use that a court of equity will not enforce a restriction of its use for dwelling-houses only and prohibiting every kind of trade or business. Thus, where, after the restriction was imposed, it appeared that an elevated railroad was constructed through the street in which the restricted land was situate, that a station of such railroad covered a portion of the street, its platform occupied half the width of the sidewalk in front of defendant's premises, and from it persons could look directly into the windows, and that this, with the noise of the trains, rendered privacy and quiet impossible, so that large depreciations in rents and frequent vacancies followed the construction of said road,—it was held that, a contingency having happened not within the contemplation of the parties, which imposed upon the property a condition frustrating the scheme devised by them, and defeating the object of the covenant, thus rendering its enforcement oppressive and inequitable, a court of equity would not decree such enforcement.<sup>2</sup> “It is true,” say the court, “the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the

family had conveyed away the larger portion of the estate to one person, or had conveyed away in plots all the estate; but I need not now settle these puzzles (which would probably have to be decided by considering who, if any one, could be regarded as substantially the owner of the Brankome estate), for, undoubtedly, at present the Durrant family still retain the estate, portions of it only being built over, and those portions having been only

leased or sold by the family in comparatively small plots. It follows that the action must be dismissed, and, as it wholly fails, I must dismiss it with costs.”

<sup>1</sup> *Baily v. De Crespigny*, L. R. 4 Q. B. 180.

<sup>2</sup> *Trustees v. Thacher*, 87 N. Y. 311, 320, 41 Am. Rep. 365, reversing 46 N. Y. Sup. Ct. 305, 14 Jones & S. 305. See, also, *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. Rep. 11.



legislature, and by reason of it there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected, in various ways and degrees, the uses of property in its neighborhood and property values. It has made the defendant's property unsuitable for the use to which, by the covenant of the grantor, it was appropriated, and if, in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity."

812. But a breach of a restriction by one purchaser must be such as to substantially defeat the object of the general scheme, in order to make consent to the breach, or acquiescence in it, amount to a release of the restriction as against other purchasers. Thus, where a tract of land was laid out for building purposes, and lots were sold with the restriction that no house or building should be used or occupied otherwise than as a private residence, and the vendor gave permission to one of the purchasers in a remote part of the tract to open a school in his house, it was held that the vendor did not thereby waive the restriction as to another purchaser whose house was at some distance from the school.<sup>1</sup> In delivering judgment James, L. J., said: "If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighborhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harassing and annoying some particular man where the court could see he was not doing it *bona fide* for the purpose of effecting the object for which the covenant was originally entered into. That is very different from the case we have before us, where the plaintiff says that in one particular spot far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing

<sup>1</sup> *German v. Chapman*, 7 Ch. D. 271, 277, 279. And see *Macher v. Foundling Hosp.* 1 Ves. & B. 188.

to say that nobody could do an act of kindness, or that any vendor of an estate who had taken covenants of this kind from several persons could not do an act of kindness, or, from any motive whatever, relax in any single instance any of these covenants, without destroying the whole effect of the stipulations which other people had entered into with him."

813. If the purpose for which restrictions were imposed can no longer be accomplished, equity will not enjoin their violation. Thus, if the purpose of restrictions was to make and preserve the locality for residences only, and the condition of the locality has greatly changed through the growth of the city, and that part of the city has come to be used chiefly for business purposes instead of residences, and it would be impossible to restore the residential character of the neighborhood by the enforcement of the restrictions upon the land to which they apply, it would be inequitable and oppressive to give effect to the restrictions.<sup>1</sup> In such case a court of equity will not enforce the restrictions, but will leave the parties to their remedy at law.

The principle of the *British Museum Case* was applied in a case involving similar covenants for the protection of the neighborhood as residential property. There was evidence that the plaintiff had acquiesced for a long time in violations of these covenants, so that the character of the property had so changed that the original purpose of keeping it for residences only had failed, and the court refused to grant an injunction to restrain further violations of the covenants. In giving judgment Pearson, J., said: "Does the covenant exist now for the purposes for which it was originally entered into? Shall I be doing justice or injustice if I grant the injunction asked for? Shall I be enforcing the covenant in order to keep the property in the state in which it was intended to be kept when these stipulations were first made, or shall I be only stopping the use of one house as a shop with no chance whatever (except by a series of actions which may succeed or which may fail) of restoring the property to that which it was originally intended to be, — a residential

<sup>1</sup> *Bedford v. British Museum*, 2 Myl. Murray, 46 N. J. Eq. 325, 19 Atl. Rep. & K. 552, per Lord Eldon; *German v.* 11; *Jackson v. Stevenson*, 156 Mass. 496, Chapman, 7 Ch. Div. 271, 279; *Sayers* 31 N. E. Rep. 691, 32 Am. St. Rep. 476; *v. Collyer*, 24 Ch. Div. 180, 187; *Davis Starkie v. Richmond*, 155 Mass. 188, 29 v. Hone, 2 Schoales & L. 340; *Page v.* N. E. Rep. 770.

property? I come to the conclusion that I must answer all these questions in the negative; I must say that the contract can no longer be performed for the purposes for which it was entered into, and that under these circumstances I ought not to grant the injunction." <sup>1</sup>

A tract of land was sold in lots with a provision that "between the lots there shall be a railway fourteen feet wide" to be used for the common benefit of the lots and for no other purpose, and that "no building is ever to be built over it." The land was conveyed on either side to the middle of this strip. Railway tracks were laid on this strip, but the use of it for a railway was afterwards abandoned. More than twenty years after such abandonment the owner of one of the lots brought a bill in equity to compel the owner of another lot to remove a structure erected on this reserved strip, claiming that, the purpose for which the restriction was made having been abandoned, he could use his lands for such purposes as he might choose, and the court supported his claim. "The deeds conveyed the fee in the whole of each lot, but, in connection with the 'terms of sale,' imposed a servitude on a strip seven feet wide on the rear of each lot, and made appurtenant to each lot an easement in a similar strip on each of the other lots. But these servitudes and easements were expressly limited to a railway; and, though it would be a benefit to each lot to receive light and air through the space which was to be kept open for the railway, the benefits of light and air are incidents which result from the provisions for a railway, and are not provided for independently of the railway, and no servitude is imposed or easement granted for any purpose but the railway; and when the railway was abandoned, all servitudes and easements terminated, and each owner had the right to use the whole of his lot for any purpose he pleased, without restraint by the 'terms of sale' or provisions in the deeds." <sup>2</sup>

#### VI. *Enforcement of Restrictions.*

814. Restrictions must be seasonably enforced, before the persons against whom it is sought to enforce the restrictions have expended money or incurred liabilities in erecting buildings or other structures upon the restricted land. "It would be contrary

<sup>1</sup> *Sayers v. Collyer*, 24 Ch. D. 180, 188 per Colburn, J. See, also, *Central Wharf*

<sup>2</sup> *Bangs v. Potter*, 135 Mass. 245, 247, *v. India Wharf*, 123 Mass. 567.

to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights and thereby inflict loss and damage on parties acting in good faith. In such cases a prompt assertion of rights is essential to a just claim for relief in equity."<sup>1</sup>

A delay of two years after the erection of buildings claimed to be in violation of a restriction, before taking any steps looking towards their removal, is such laches by complainants as will justify a court of equity in refusing a mandatory injunction for their removal.<sup>2</sup>

But if the person entitled to enforce a restriction has given due notice of its violation, he is entitled to his remedy, though the person violating the restriction has proceeded to complete the structure in violation of the restriction.<sup>3</sup>

The violation of a restriction may be enjoined when such violation has only commenced or is merely threatened. If the violation of it consists in the erection of some structure, it is not necessary to wait until the objectionable structure is completed before filing a bill to enjoin it.<sup>4</sup> But the complainant may wait for the completion of the structure erected in violation of the restriction and he will not be held to have lost his equitable remedy, especially if he has remonstrated against the structure during the building of it.<sup>5</sup>

**815.** A restrictive covenant can be enforced only by the owner of some part of the dominant land for the benefit of which the covenant was made. It cannot be enforced by the grantor who created the covenant, nor by his heirs, after he or they have parted with all interest in any land benefited by the covenant. A tract of land had been conveyed in lots to various purchasers, except one central block, which the owner conveyed

<sup>1</sup> *Whitney v. Union Ry. Co.* 11 Gray, 359, 367, 71 Am. Dec. 715, per Bigelow, J.; *Jewell v. Lee*, 14 Allen, 145, 150, 92

Am. Dec. 744, per Bigelow, C. J.; *Shepard v. Allen*, 3 Taunt. 78; *Mitchell v. Leavitt*, 30 Conn. 587; *Water Lot Co. v. Bucks*, 5 Ga. 315; *Boscawen v. Bliss*, 4 Taunt. 735. See *Rose v. Hawley*, 118 N. Y. 502, 517, 23 N. E. Rep. 904, as to whether a question of law is raised by the delay.

<sup>2</sup> *Gatzmer v. St. Vincent School Soc.*

147 Pa. St. 313, 23 Atl. Rep. 452. And see *Gillis v. Bailey*, 21 N. H. 149.

<sup>3</sup> *Linzee v. Mixer*, 101 Mass. 512; *Attorney-General v. Algonquin Club*, 153 Mass. 447, 27 N. E. Rep. 2.

<sup>4</sup> *Peck v. Matthews*, L. R. 3 Eq. 515; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. Rep. 691, 32 Am. St. Rep. 476; *Attorney-General v. Algonquin Club*, 153 Mass. 447, 27 N. E. Rep. 2.

<sup>5</sup> *Attorney-General v. Algonquin Club*, 153 Mass. 447, 27 N. E. Rep. 2.

to trustees as a park for the benefit of the adjoining lots. The conveyance recited that it was made by the advice and consent of the owners of the dominant lots. After the usual covenants of title was a clause wherein it was covenanted and agreed by the trustees and their survivors that they would not permit noxious trades, nor use the premises for any other purpose than as an ornamental park. Afterwards the park was mortgaged for improvements and sold under foreclosure, passing by various conveyances into the hands of purchasers in good faith and for value. On a bill by the grantor's heirs to divest the title, it was held that they had no right to relief, not being the owners of any of the dominant lots.<sup>1</sup>

The vendor or original covenantor, after having parted with all his interest in the property, is neither a necessary nor a proper party to an action by one purchaser against another to enforce the covenant.<sup>2</sup> The vendor may bring the action to enforce the covenant so long as he has an interest in the property benefited by it,<sup>3</sup> even though he does this in the interest of a purchaser.

**816. A covenant that runs with the land must be enforced by the owner of the land benefited against the owner of the land burdened by the covenant.** Thus, where a deed of a right of way to a railroad company provided that the grantee should fence the road and forever maintain the fence, a successor of the company by purchase at a foreclosure sale claimed that the grantor, who at the time the deed was made owned only an undivided eighth part of the land but had afterwards acquired the whole interest, could recover at most only one eighth of the damages for a breach of such covenant. But the court held this posi-

<sup>1</sup> *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. Rep. 655, affirming 41 Hun, 643. The court by Vann, J., say: "But the plaintiffs claim that, even if the provision is a covenant, they are still entitled to some relief, because, as it is insisted, the easements have been abandoned and the covenant violated. The weakness of this position is that the covenant was not made for their benefit, or for the benefit of their ancestor. If the owner of a dominant lot, who had not abandoned his right to the park, were here asking the preventive remedies of the court, a differ-

ent question would be presented. The plaintiffs, however, are not in a situation to ask that the park should be maintained, or its desecration prevented. The whole title to the park and the contiguous lots passed from their father in his lifetime, and they inherited no right to either. As they have title neither to the park nor to any land for the benefit of which the park was created, they have no foundation upon which to base an action."

<sup>2</sup> *Clements v. Wells*, L. R. 1 Eq. 200; *Bowes v. Law*, L. R. 9 Eq. 636.

<sup>3</sup> *Manners v. Johnson*, 1 Ch. D. 673.

tion to be untenable, saying: "The covenant embraced in the deed is one that runs with the land. It casts upon the immediate and subsequent grantees of the easement the burden of maintaining the fences and crossings, while the subsequent grantees of the fee simple, who take it with the burden of the easement, acquire all the rights and benefits that would have inured to the original grantor out of the easement by reason of the conveyance to the first company. The covenant passes by assignment, not only to the subsequent grantees of the easement, but also to those of the fee simple; and each set of grantees, when they accept the conveyance, take it with all the burdens and benefits annexed to it. The remote grantee of the easement can enjoy the benefits thereof only by assuming also the corresponding burdens growing out of the grant; and the owner, who succeeded to the whole of the fee in the land, acquired with it, as the owner of the servient estate, not only the burden created by the conveyance of the easement, but also the benefits intermixed with it."<sup>1</sup>

**817. Joinder of parties to suit.** — It is not necessary that the plaintiff should join as parties defendant all persons who have violated the same restrictions;<sup>2</sup> nor is it necessary that he should join with himself as parties all other persons entitled to the benefit of the covenant, or undertake to prosecute the suit in their behalf.<sup>3</sup>

**818. A restriction imposed to preserve the grantor's other land for residences will be enforced only for the purpose for which it was made.** Thus, a provision that no oil-well should be drilled in the land conveyed will be enforced by injunction; but the grantee will not be held to an accounting for the oil already pumped, when it appears that this restriction was not to

<sup>1</sup> Toledo, St. L. & C. R. Co. v. Cosand, 6 Ind. App. 222, 33 N. E. Rep. 251; Lake Erie & W. R. Co. v. Priest, 131 Ind. 413, 31 N. E. Rep. 77; Scott v. Stetler, 128 Ind. 385, 27 N. E. Rep. 721; Midland Ry. Co. v. Fisher, 125 Ind. 19, 24 N. E. Rep. 756.

<sup>2</sup> Linzee v. Mixer, 101 Mass. 512, 531; Payson v. Burnham, 141 Mass. 547, 556, 6 N. E. Rep. 708.

<sup>3</sup> Western v. Macdermot, L. R. 1 Eq. 499, 509, affirmed 2 Ch. App. 72. Ro-

milly, M. R., said: "I am of opinion that one alone is entitled to ask for redress although others should decline to do so, or should disregard the act complained of. It may also well be that the injury is principally, or almost entirely, felt by one or two of the owners, and that those who are further off sustain no inconvenience, in which case they could not be required to join in or support the application."

§§ 819-821.] RESTRICTIONS AS TO THE USE OF LAND.

prevent the drainage of his remaining lands, but to preserve other land for residence purposes.<sup>1</sup>

819. A stipulation for keeping open a common passageway may be enforced in equity by the grantor, or by abutters who are entitled to use it, although the grantor reserved to himself the right to enter upon the premises by his agents, and at the expense of the party in fault, to remove or alter, in conformity with the stipulation, any building or portion thereof which might be erected on the premises in a manner or to a use contrary to the stipulation.<sup>2</sup>

820. A mandatory injunction will not be issued where complainant's rights are not clear.<sup>3</sup> Whether a restriction in the deed prohibiting the construction on the granted premises of any manufactory, workshop, etc., or "building of any kind to be used for any purpose other than one used for a genteel cottage or dwelling-house," is violated by the erection of a boat-house, clubhouse, and another building used merely for repairing the boats belonging to the club, and occasionally the construction of a new one, is a question not so clear as to warrant a court of equity in granting a mandatory injunction for the removal of the buildings, but complainants will be remitted to their remedy at law.<sup>4</sup>

821. Equity has jurisdiction of the enforcement of restrictions, for restrictions are negative covenants or agreements not to do certain acts; and a threatened violation may be restrained by injunction, or, after the forbidden act has been done, a mandatory injunction may be issued to undo it. "Equity will not decree specific performance of affirmative contracts that call for the exercise of skill, discretion, or good faith; but when the required acts are of a simple nature, it seems that the court will take jurisdiction. It has enforced contracts to keep in repair the stop-gate of a canal,<sup>5</sup> to construct an archway,<sup>6</sup> to lay a railway track over certain land,<sup>7</sup> and to maintain a switch."<sup>8</sup>

<sup>1</sup> *Acheson v. Stevenson*, 146 Pa. St. 228, 23 Atl. Rep. 331. See, also, *Bangs v. Potter*, 135 Mass. 245.

<sup>2</sup> *Attorney-General v. Williams*, 140 Mass. 329, 2 N. E. Rep. 80, 3 N. E. Rep. 214, 54 Am. Rep. 468.

<sup>3</sup> *Delaware, L. & W. R. Co. v. Central S. Y. Co.* 45 N. J. Eq. 50, 17 Atl. Rep. 146; *Mayer's Appeal*, 73 Pa. St. 164.

<sup>4</sup> *Gatzmer v. St. Vincent School Soc.* 147 Pa. St. 313, 23 Atl. Rep. 452.

<sup>5</sup> *Lane v. Newdigate*, 10 Ves. 192.

<sup>6</sup> *Storer v. G. W. Ry. Co.* 2 Y. & C. C. 48.

<sup>7</sup> *Wilson v. Furness Ry. Co.* L. R. 9 Eq. 28.

<sup>8</sup> *Lydick v. B. & O. R. Co.* 17 W. Va. 427. "In *Cooke v. Chilcott*, 3 Ch. D.

**822.** A court of equity will not enforce restrictions where there are circumstances that render their enforcement inequitable, although it clearly appears that there has been such a violation of them as would ordinarily induce the court to interfere. "If, for instance, it was shown that one or two owners of estates were insisting on the observance of restrictions and limitations contrary to the interest and wishes of a large number of proprietors having similar rights and interests, by which great pecuniary loss would be inflicted on them, or a public improvement be prevented, a court of equity might well hesitate to use its powers to enforce a specific performance, or restrain a breach of the restriction."<sup>1</sup>

**823.** The violation of a restriction may be enjoined without showing actual damage.<sup>2</sup> "I take it now to be the law," says Vice-Chancellor Hall, "that if a covenant of this character is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building upon property, then the party who stipulates for and obtains that covenant does so free from being embarrassed by the question whether any, and, if any, what injury or damage is consequent on the breach of the covenant, and that an assign of the benefit of the covenant is in as good a position as the original covenantee."<sup>3</sup>

694, a covenant to supply adjacent land with water was enforced although it necessitated laying pipes and erecting machinery. This undoubtedly goes too far, and has since been overruled." Charles I. Giddings on Restrictions Upon the Use of Land, 5 Harv. L. Rev. 279. See, as to enforcement of affirmative covenants, 2 Story Eq. Jur. 44, 45.

<sup>1</sup> Parker v. Nightingale, 6 Allen, 341, 349, per Bigelow, C. J.

<sup>2</sup> Collins v. Castle, 36 Ch. D. 243; German v. Chapman, 7 Ch. D. 271; Dickinson v. Grand Junc. Canal Co. 15 Beav. 260; Richards v. Revitt, 7 Ch. D. 224; Manners v. Johnson, 1 Ch. D. 673; Tipping v. Eckersley, 2 Kay & J. 264, 270; Leech v. Schweder, 9 Ch. App. 463, 465; Peck v. Conway, 119 Mass. 546; Hall v. Webster, 7 Mo. App. 56.

<sup>3</sup> Manners v. Johnson, 1 Ch. D. 673, 679, citing Kemp v. Sober, 1 Sim. N. S.

517; Tipping v. Eckersley, 2 K. & J. 264, 270; Dickinson v. Grand Junc. Canal Co. 15 Beav. 260; Leech v. Schweder, 9 Ch. D. 463. See Johnstone v. Hall, 2 Kay & J. 420, where relief was refused to a reversioner and the damage to his interest was remote and trivial.

The cases cited in this section substantially overrule Western v. Macdermot, L. R. 1 Eq. 499, where Romilly, M. R., said that a court of equity would not interfere by injunction unless it were shown that substantial injury would result from the breach of the covenant. "I use the words 'substantial injury' because it is, I think, clear that a mere nominal breach of covenant, which inflicted no injury at all, would not justify this court in interfering; but the court would in that case leave the parties to their remedy at law to obtain such compensation as they might be entitled to." Upon the appeal of this



A complainant who is entitled to a perpetual injunction against the breach of restriction cannot be compelled to accept damages in lieu of an injunction. A person cannot be compelled to submit to a wrong and an injury to his property at a price to be fixed by a court of equity.<sup>1</sup>

The question of the character and degree of annoyance caused by the breach of a covenant will not be considered in granting an injunction to restrain a breach of the covenant not to use the property for certain purposes. It is not competent to inquire into the reasonableness of the condition which totally prohibits a particular use of the property. There is no question of degrees of violation in such case. Such a question arises, however, where the condition is merely against nuisances, or noxious or annoying trades.<sup>2</sup>

824. In an action to recover damages by one lot-owner against another for a breach of a restriction imposed upon all the lots, evidence of the damage caused by such breach should be given in order to entitle the plaintiff to recover. Without such evidence it is error to charge that plaintiff was entitled to recover as damages the difference in value of the land as it was affected by the breach of the restriction and the value it would have possessed if the restriction had been observed.<sup>3</sup>

For a breach of a covenant by a purchaser to build houses on the land conveyed, the grantor cannot recover as damages the amount required to carry on his building operations upon his remaining land, on the theory that when the covenant was made the parties had in contemplation the benefits to accrue to the remainder of the grantor's lots by the building of houses on those

case, Lord Chelmsford repudiated the proposition that equity would not interfere unless the complainant has sustained or is likely to sustain actual damage. In the case before the court, "the object of the covenant was to prevent, for all future time, any obstruction to the view from the backs of the houses on the south side of Brock Street by buildings or trees above a certain height. Any building erected, or any tree permitted to grow above this height, would be a breach of the covenant; and yet the damage to any one of the owners of the houses might be scarcely appreciable. If, then, it were necessary

to wait until 'substantial injury' (to use the words of the Master of the Rolls) were sustained, that period might never arrive, although violations of the covenant might be continually occurring, and the owners of the houses would never be in a situation to invoke the interposition of this court to prevent the breach of a covenant intended solely for their benefit." 2 Ch. App. 72, 75.

<sup>1</sup> *Krehl v. Burrell*, 11 Ch. D. 146.

<sup>2</sup> *Hall v. Wesster*, 7 Mo. App. 56.

<sup>3</sup> *Amerman v. Deane*, 15 N. Y. Supp. 327, reversing 6 N. Y. Supp. 542.

sold to the grantee, and that, on account of the latter's breach, the grantor was unable to sell the houses erected by him in reliance upon the grantee's covenant.<sup>1</sup>

If a restriction expires by limitation before the determination of a suit to enjoin a violation of it, a decree should be rendered merely for damages for the violation of the restriction while it continued in force.<sup>2</sup>

<sup>1</sup> *McConaghy v. Pemberton*, 168 Pa. St. 121, 31 Atl. Rep. 996.

<sup>2</sup> *Langmaid v. Reed*, 159 Mass. 409, 34 N. E. Rep. 593.

## CHAPTER XXIII.

### COVENANTS FOR TITLE.

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| II. Implied covenants, 833-841.                         | VIII. Measure of damages on covenants against incumbrances, 957-967. |
| III. Covenants for seisin and right to convey, 842-851. | IX. Measure of damages on covenants of warranty, 968-989.            |
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#### I. *In General.*

**825.** A covenant is an agreement under seal.<sup>1</sup> It may be made by a deed poll as well as by indenture.<sup>2</sup> It may be created by any words which show the intention of the parties.<sup>3</sup> Thus the word "agree" has the same effect as the word "covenant." The covenant itself need not be in the usual form, or in any particular words. Whatever be the words used, the effect of the covenant is to be ascertained from the legal interpretation of the language in which it is expressed.<sup>4</sup> A single promise expressed in a single sentence may be so comprehensive as to include all the usual covenants.

**826.** The covenants in modern deeds have their origin in the feudal warranty, which was an incident of the tenure by which the vassal held his lands of his lord. While the vassal was bound to render homage to his lord, the lord was bound to protect his vassal in the enjoyment of his lands. If the title to the land was disputed and the lord failed to protect it, he was bound

<sup>1</sup> Shep. Touch. 160; *De Bolle v. Pennsylvania Ins. Co.* 4 Whart. 68, 33 Am. Dec. 38.

<sup>2</sup> *Green v. Horne*, 1 Salk. 197; *Greenleaf v. Allen*, 127 Mass. 248; *Hagerty v. Lee*, 54 N. J. L. 580, 25 Atl. Rep. 319, 26 Atl. Rep. 537.

<sup>3</sup> *Kirkendall v. Mitchell*, 3 McLean, 144; *Hallett v. Wylie*, 3 Johns. 44; *Jackson v. Swart*, 20 Johns. 85; *Bull v. Follett*, 5 Cow. 170; *Taylor v. Preston*, 79 Pa. St. 436; *Kerngood v. Davis*, 21 S. C. 183.

<sup>4</sup> *Johnson v. Hollensworth*, 48 Mich. 140, 11 N. W. Rep. 843.

to furnish other land of equal value. Originally there was no contract to this effect, but the right to this protection rested upon the feudal relation and custom. When transfers of land came to be authenticated by charters or deeds, a warranty was implied from the word *dedi*, and was expressed by the word *warrantizo*. "And no other verb in our law," says Coke, "doth make a warranty." Mr. Rawle, in his admirable work on Covenants for Title, sketches an outline of the ancient law of warranty, and of the origin of modern covenants for title, and in conclusion says: "So long as livery of seisin was necessary to the validity of the transfer of land, so long did warranty, which was essentially a covenant real, accompany the deed of feoffment. A personal covenant would have been an inappropriate element of such a form of conveyance. But the passage of the Statute of Uses, toward the latter part of the reign of Henry the Eighth, introduced the conveyances familiar at the present day, which, taking their effect under that statute, passed the freehold without livery of seisin; and in a deed of bargain and sale, or lease and release, a warranty, in its proper sense, would have been just as inappropriate as would have been a personal covenant in a deed of feoffment, while the covenant was eminently fitting. And hence it may be that we find, all through the reports of the time of Elizabeth, cases in which some of the covenants for title—generally, a covenant for seisin or of good right to convey—are used in conveyances taking effect by virtue of the Statute of Uses. They are, however, generally couched in the briefest terms, and unaccompanied by other covenants. And by common consent it is considered that it was not until the time of the restoration of Charles the Second that the modern covenants for title were, in their present form, introduced into general practice."

827. The usual covenants in ordinary deeds in fee simple in this country are: I. That the grantor is lawfully seised; II. That he has good right to convey; III. That the land is free from incumbrances; IV. That the grantee shall quietly enjoy; V. That the grantor will warrant and defend the title against all lawful claims.<sup>1</sup> The covenant for quiet enjoyment is now chiefly confined to leases; and the covenant for further assurance, though sometimes of importance, is not in use in the common forms of

<sup>1</sup> 4 Kent Com. 471.

deeds. The covenants for seisin, against incumbrances, and of warranty are therefore practically the usual covenants.

**828.** An agreement to convey land requires in most of the States a conveyance with the usual covenants for title,<sup>1</sup> though, in a few States at least, a contract to convey a good title is satisfied by a conveyance of such a title by a quitclaim deed.<sup>2</sup> "If a grantor has in fact a good title, his deed of quitclaim conveys his title and estate as effectually as a deed of warranty. An agreement or covenant to convey a title, therefore, does not necessarily entitle the covenantee to a warranty deed; the right of property and of exclusive possession, which constitutes a good title, being effectually vested in him by a deed of quitclaim."<sup>3</sup>

**829.** An agreement to convey by a good and sufficient warranty deed requires a good and perfect title, as well as a good and sufficient warranty deed.<sup>4</sup> A contract to convey "by deed in fee simple and free from all incumbrances" is not fulfilled by the delivery and acceptance of a deed with full covenants of war-

<sup>1</sup> **Alabama:** Cullum v. Branch Bank, 4 Ala. 21. **Arkansas:** Rudd v. Savelli, 44 Ark. 145; Witter v. Biscoe, 13 Ark. 422. **California:** Rogers v. Borchard, 82 Cal. 347, 22 Pac. Rep. 907. **Illinois:** Clark v. Lyons, 25 Ill. 105. **Indiana:** Bethell v. Bethell, 92 Ind. 318; Gibson v. Richart, 83 Ind. 313; Linn v. Barkey, 7 Ind. 69; Clark v. Redman, 1 Blackf. 379. **Iowa:** Shreck v. Pierce, 3 Iowa, 350. **Kentucky:** Andrews v. Word, 17 B. Mon. 518; Hedges v. Kerr, 4 B. Mon. 526. **Maryland:** Bryant v. Wilson, 71 Md. 440. **Michigan:** Dikeman v. Arnold, 71 Mich. 656; Allen v. Hazen, 26 Mich. 142; Dwight v. Cutler, 3 Mich. 566, 64 Am. Dec. 105; Johnson v. Hollensworth, 48 Mich. 140, 11 N. W. Rep. 843; Allen v. Atkinson, 21 Mich. 351. **Minnesota:** Johnston v. Piper, 4 Minn. 192. **Missouri:** Herryford v. Turner, 67 Mo. 296. **North Carolina:** Faircloth v. Isler, 75 N. C. 551. **Ohio:** Tremain v. Liming, Wright, 644. **Rhode Island:** Point Street Iron Works v. Simmons, 11 R. I. 496. **Texas:** Taul v. Bradford, 20 Tex. 261; Rhode v. Alley, 27 Tex. 443. **Vermont:** Bowen v. Thrall, 28 Vt. 382. **Virginia:** Hoback v. Kilgore, 26

Gratt. 442, 21 Am. Rep. 317; Goddin v. Vaughn, 14 Gratt. 102, 117; Dickinson v. Hoomes, 8 Gratt. 353, 394. **West Virginia:** Tavenner v. Barrett, 21 W. Va. 656; Allen v. Yeater, 17 W. Va. 128.

<sup>2</sup> **Connecticut:** Potter v. Tuttle, 22 Conn. 512; Dodd v. Seymour, 21 Conn. 476. **Maine:** Hill v. Hobart, 16 Me. 164. **Massachusetts:** Kyle v. Kavanagh, 103 Mass. 356, 359, 4 Am. Rep. 560; Mansfield v. Dyer, 131 Mass. 200, 201. **New York:** Gazley v. Price, 16 Johns. 267; Ketchum v. Evertson, 13 Johns. 359; Van Eps v. Schenectady, 12 Johns. 436. **Pennsylvania:** Cadwalader v. Tryon, 37 Pa. St. 318; Espy v. Anderson, 14 Pa. St. 308.

<sup>3</sup> Kyle v. Kavanagh, 103 Mass. 356, per Morton, J.

<sup>4</sup> Mead v. Fox, 6 Cush. 199, 202; Burwell v. Jackson, 9 N. Y. 535; Little v. Paddleford, 13 N. H. 167; Hill v. Hobart, 16 Me. 164; Carter v. Alexander, 71 Mo. 585; Wilson v. Getty, 57 Pa. St. 266; Christian v. Cabell, 22 Gratt. 82; Davis v. Henderson, 17 Wis. 105; Varde-man v. Lawson, 17 Tex. 10, 16.

ranty, when there is at the time an outstanding mortgage of the land.<sup>1</sup>

**830.** A person holding land in a fiduciary character can make good and sufficient conveyance without using the general covenants for title. It is sufficient that he covenants against his own acts;<sup>2</sup> and a trustee's deed is, in some parts of the country, always made without any covenant at all. The persons beneficially interested under the trust may, however, properly be required to make covenants for title.

The covenants of a person executing a deed in a representative capacity do not bind the estate he represents.<sup>3</sup>

**831.** A person executing a conveyance in a representative capacity, such as administrator, guardian, or trustee, with the covenants for title usual in other deeds, is personally bound by them, though he was under no obligation to make any of them, and had no authority to bind the estate he represented by such covenants.<sup>4</sup> Such is the case, also, where the covenants are implied from the use of the words "grant, bargain, and sell."<sup>5</sup>

**832.** An agent of a State who purchases land and conveys it to the State by warranty deed is bound by his warranty if the purchase by the State was not a mere ratification of the act of its agent, so as to thereby render the agent's covenant void for want of consideration. Such a covenant was held to be binding upon one who, being desirous of acquiring the contract for a wall around the state penitentiary, at the request of the officials bought land which they desired for penitentiary purposes, but which they were themselves unable to purchase for the State, owing to their

<sup>1</sup> *Moody v. Spokane, &c. R. Co.* 5 Wash. 699, 32 Pac. Rep. 751.

<sup>2</sup> *Dow v. Lewis*, 4 Gray, 468, 473; *Sumner v. Williams*, 8 Mass. 201; *Hodges v. Saunders*, 17 Pick. 470; *Dwinel v. Veazie*, 36 Me. 509; *Shontz v. Brown*, 27 Pa. St. 123, 134.

<sup>3</sup> *Sumner v. Williams*, 8 Mass. 162; *Mason v. Ham*, 36 Me. 573; *Shontz v. Brown*, 27 Pa. St. 134; *Lockwood v. Gilson*, 12 Ohio St. 526; *Klopp v. Moore*, 6 Kans. 27; *Mabie v. Matteson*, 17 Wis. 1; *Osborne v. McMillan*, 5 Jones L. 109; *Shacklett v. Ranson*, 54 Ga. 350; *Clark v. Whitehead*, 47 Ga. 516, 521.

<sup>4</sup> *Taylor v. Davis*, 110 U. S. 330; *Sum-*

*ner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Heard v. Hall*, 16 Pick. 468; *Whiting v. Dewey*, 15 Pick. 428; *Donahoe v. Emery*, 9 Metc. 63; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Belden v. Seymour*, 8 Conn. 19; *Foster v. Young*, 35 Iowa, 27; *Bloom v. Wolfe*, 50 Iowa, 286; *Magee v. Mellon*, 23 Miss. 585; *Holyoke v. Clark*, 54 N. H. 578; *Graves v. Mattingly*, 6 Bush, 361; *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. Rep. 464; *Murphy v. Price*, 48 Mo. 247; *Taylor v. Harrison*, 47 Tex. 454.

<sup>5</sup> *Foot v. Clark*, 102 Mo. 394, 14 S. W. Rep. 981; *Murphy v. Price*, 48 Mo. 247; *Pratt v. Eaton*, 65 Mo. 157.

want of authority, on the promise by such officials to use their influence to induce the State to repurchase it, and was awarded the contract to erect the wall, and afterwards conveyed the land to the State, with covenants of warranty, for the same price he had paid for it.<sup>1</sup>

## II. *Implied Covenants.*

**833.** There are implied covenants as well as express. Express covenants are those in which the intent to covenant is declared in words, and implied are those inferred by legal construction from the use of certain words of conveyance. It has sometimes been said that a covenant may be implied from a recital,<sup>2</sup> but this doctrine has been declared by high authority to be a dangerous one, and it has been decisively repudiated.<sup>3</sup> A covenant other than for title may undoubtedly be implied from a recital, but not a covenant for title. A recital of seisin, when modified and explained by other parts of the instrument, does not amount to a covenant.<sup>4</sup> The true rule is to view the recital in the light cast on it by the rest of the deed, and give effect to the intention as a consistent whole.<sup>5</sup> Where the terms of a deed of conveyance, taking the whole together, show that the instrument is in its essence a quitclaim title, and that the makers intended no warranty except as against themselves and their own acts, no covenant will be raised out of a recital of facts, or out of a use of words of conveyance.<sup>6</sup>

<sup>1</sup> *Whitley v. Patten* (Tex. Civ. App.), 31 S. W. Rep. 60.

<sup>2</sup> *Severn's Case*, Leon. 122; *Christine v. Whitehill*, 16 Serg. & R. 98, Gibson, C. J., dissenting.

<sup>3</sup> *Rawle, Cov.* § 280; *Ferguson v. Dent*, 8 Mo. 667.

<sup>4</sup> *Delmer v. M'Cabe*, 14 Ir. C. L. 377.

<sup>5</sup> *McDonough v. Martin*, 88 Ga. 675, 16 S. E. Rep. 59, per Bleckley, C. J.; *Platt, Cov.* 33; *Severn's Case*, Leon. 122.

<sup>6</sup> *McDonough v. Martin*, 88 Ga. 675, 16 S. E. Rep. 59. Bleckley, C. J., said: "The law is clear that, where the buyer takes a quitclaim deed,—that is, a deed without any warranty,—the maxim of *caveat emptor* applies. He is without remedy if the title fails. He cannot recover back the purchase-money, either at law or

in equity. *Dorsey v. Jackman*, 1 Serg. & R. 42, 7 Am. Dec. 611; *Earle v. De Witt*, 6 Allen, 520; *Soper v. Stevens*, 14 Me. 133; *Bates v. Delavan*, 5 Paige, 299. And see *Commonwealth v. M'Clanachan*, 4 Rand. 482. Equity will not relieve against payment of the purchase-money. 1 Fonbl. Eq. 373, note; *Rawle, Con.* § 321; *Barkhamsted v. Case*, 5 Conn. 528, 13 Am. Dec. 92, 2 Sugd. Vend. 552. Nor can the purchaser have rescission. *Maney v. Porter*, 3 Humph. 347, 363; *Middlekauff v. Barrick*, 4 Gill, 290; *Butman v. Hussey*, 30 Me. 263. Nor can he set up the failure of title in defence to an action for the purchase-money. *Buckner v. Street*, 15 Fed. Rep. 365; *Wright v. Shorter*, 56 Ga. 72."

**834.** At common law the only word that necessarily imported a covenant of title was the word "give."<sup>1</sup> The word "grant" did not imply a covenant, nor the words "bargain" and "sell."<sup>2</sup> But since the Statute of Uses there have been no covenants by implication. The deed of bargain and sale then came into use, and this is the deed in common use at the present time. Except as declared by statute, there are in this country no implied covenants.<sup>3</sup> A covenant of seisin is not implied at common law from the use of the operative words, "grant, bargain, sell, convey, and warrant."<sup>4</sup>

**835.** By statute in many States, certain words used in a deed of conveyance themselves import covenants for title as effectually as though such covenants had been expressly contained in the deed. These statutes have for their foundation the statute of Anne, passed in 1707.<sup>5</sup> The first statute of this kind in this country was an act of the colony of Pennsylvania, passed in 1715. Similar acts have since been enacted in many of the States.<sup>6</sup> They

<sup>1</sup> *Frost v. Raymond*, 2 Caines, 188, 2 Am. Dec. 228. But this word does not raise a covenant in a conveyance merely of the grantor's rights in the land. *Deakins v. Hollis*, 7 Gill & J. 311.

<sup>2</sup> *Platt*, Cov. 47, 48; *Rickets v. Dickens*, 1 Murph. 343, 4 Am. Dec. 555; *Frost v. Raymond*, 2 Caines, 188, 2 Am. Dec. 228; *Wheeler v. Wayne Co.* 132 Ill. 599, 24 N. E. Rep. 625; *Gee v. Pharr*, 5 Ala. 586, 39 Am. Dec. 339.

<sup>3</sup> *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 221; *Bates v. Foster*, 59 Me. 157, 160, 8 Am. Rep. 406; *Wheeler v. Wayne Co.* 132 Ill. 599, 24 N. E. Rep. 625; *Sumner v. Williams*, 8 Mass. 162, 201; *Dow v. Lewis*, 4 Gray, 468, 473.

<sup>4</sup> *Frost v. Raymond*, 2 Caines, 188, 2 Am. Dec. 228, where Chancellor Kent expressly repudiates, as opposed to the entire stream of authorities, a statement to the contrary by Lord Eldon in *Browning v. Wright*, 2 Bos. & P. 13, 21; *Aiken v. Franklin*, 42 Minn. 91, 43 N. W. Rep. 839.

<sup>5</sup> 6 Anne, ch. 35.

<sup>6</sup> *Alabama*: The words "grant, bargain, sell," or either of them, imply covenants of seisin, against incumbrances by

the grantor, and for quiet enjoyment. Code 1886, § 1839. *Arizona T.*: Words "grant or convey" import covenants of seisin and against incumbrances. R. S. 1887, §§ 222, 223. *Arkansas*: Words "grant, bargain, and sell" import covenants of seisin, against incumbrances by the grantor and for quiet enjoyment. Dig. of Stats. 1894, § 696. *California, Idaho, Montana, Nevada, North Dakota and South Dakota, Texas*: The word "grant" implies a covenant that the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee; and against incumbrances by the grantor. Cal. Civ. Code, § 1113; *Ida. R. S.* 1887, § 2935; *Mont. Civ. Code*, § 1519; *Nev. G. S.* 1885, § 2618; *North Dak. R. Codes* 1895, § 3539; *South Dak. Comp. Laws of Dakota* 1887, §§ 3247, 3449; *Tex. R. S.* 1879, arts. 553, 557. *Delaware*: The words "grant, bargain, and sell" imply a special warranty against a grantor and his heirs. R. Code 1893, p. 625, § 2. *Illinois*: The words "grant, bargain, and sell" import covenants of seisin, against incumbrances by the grantor, and for quiet enjoyment against the grantor. R. S.



have for their object the raising of certain covenants by the use of the word "grant," or the words "grant, bargain, and sell," against the grantor, and in some cases against his heirs also, in favor of the grantee, his heirs and assigns.<sup>1</sup> The Pennsylvania statute, from which the other statutes have generally been modelled, is in the words following: "In all deeds to be recorded in pursuance of this act, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, the words 'grant, bargain, sell' shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit, that the grantor was seised of an indefeasible estate in fee simple, freed from incumbrance done or suffered from the grantor (excepting the rents and services due to the lord of the fee), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and that the grantee, his heirs, executors, administrators, and assigns, may in any action assign breaches, as if such covenants were expressly inserted."

In several States all the usual covenants of warranty — namely, for seisin, good right to convey, against incumbrances, for quiet enjoyment, and warranty against all persons — are expressed by the use of the words "warrants" or "with warranty;"<sup>2</sup> or by the use of the words "generally warrants," or "with general warranty."<sup>3</sup> In most of these same States a special warranty against the claims of the grantor, and of all persons claiming through him, is expressed by the use of the words "warrant specially," or "with special warranty."

1889, ch. 30, § 8. **Mississippi**: The words "grant, bargain, and sell" import covenants of seisin, against incumbrances by the grantor, and quiet enjoyment against the grantor. Annot. Code 1892, § 2440. **Missouri**: The words "grant, bargain, and sell" import covenants of seisin, against incumbrances by the grantor, and for further assurances. R. S. 1889, § 2402. **New Mexico** T.: The words "bargained and sold" import covenants of seisin and against incumbrances by the grantor. Comp. Laws 1884, § 2570. **Pennsylvania**: The words "grant, bargain, and sell" constitute express covenants of seisin against incumbrances by the grantor, and for quiet enjoyment against the

grantor. Brightly's Pardon's Dig. 1894, p. 646, § 100.

<sup>1</sup> *Dun v. Dietrich*, 3 N. D. 3, 53 N. W. Rep. 81.

<sup>2</sup> **Illinois**: R. S. 1889, ch. 30, § 9. **Indiana**: R. S. 1888, § 2927. **Kansas**: G. S. 1889, § 1110. **Kentucky**: G. S. 1894, § 493. **Michigan**: G. S. 1882, § 5728. **Mississippi**: Annot. Code 1892, § 2480. **Washington**: Laws 1885-86, p. 177. **Wisconsin**: Annot. Stats. 1889, § 2208. **Oklahoma** T.: Comp. Stats. 1890, §§ 1696, 1697. **Utah**: Laws 1890, ch. 57, § 6.

<sup>3</sup> **Maryland**: Pub. G. L. 1888, art. 21, §§ 69-76. **Virginia**: Code 1887, §§ 2437-2452. **West Virginia**: Code 1887, ch. 72, §§ 12-19.

In several States it is expressly provided that no covenant shall be implied in any conveyance, whether it contains special covenants or not.<sup>1</sup>

836. All the words specified by the statute must be used, unless the statute provides that the use of either of them shall be sufficient. Thus, under a statute creating a covenant from the use of the words "grant, bargain, and sell," a covenant will be implied only when all the words of the statute are used. A covenant is not implied from the use of the word "grant" alone.<sup>2</sup>

837. In these statutes the first covenant mentioned, the covenant of seisin, which standing by itself is unlimited, is held to be limited to the acts of the grantor, by reason of the limitation to that effect in the subsequent covenant against incumbrances, so that none of the covenants implied extend beyond the acts of the covenantor.<sup>3</sup>

Under a statute whereby the words "grant, bargain, and sell" are declared to import an express covenant that the grantor is seised of an estate in fee simple, freed from incumbrances done or suffered from the grantor, as also for quiet enjoyment against the grantor, his heirs and assigns, no general covenant against incumbrances and for quiet enjoyment is created, but only a covenant against acts done or suffered by the grantor and his heirs.<sup>4</sup>

It is held in Texas, however, that under a statute which provides that the usual covenants shall be implied in a deed from the use of the word "grant," the force of the word, as a warranty against a prior incumbrance by the grantor, is not taken away by the use of the words "release and quitclaim" in the concluding clause of the deed, and the restriction of the warranty to

<sup>1</sup> Michigan: G. S. 1882, § 5655. Minnesota: G. S. 1894, ch. 40, § 4165. New York: 4 R. S. 1889, p. 2452. Oregon: Annot. Laws 1887, § 3003. Wisconsin: Annot. Stats. 1889, § 2206.

<sup>2</sup> Gee v. Pharr, 5 Ala. 586, 39 Am. Dec. 339; Wheeler v. Wayne Co. 132 Ill. 599, 24 N. E. Rep. 625. "If one of these words may be dispensed with in the creation of the covenants named in the act, so might others; and the introduction of either of them into a deed might be made to operate as a covenant under the stat-

ute, when perhaps it was never thought of by either party." Per Wilkin, J.; Frank v. Darst, 14 Ill. 304. See, also, Whitehill v. Gotwalt, 3 Pen. & W. 313, 323.

<sup>3</sup> Gratz v. Ewalt, 2 Binn. 95; Funk v. Voneida, 11 S. & R. 109; Seitzinger v. Weaver, 1 Rawle, 377; Roebuck v. Dupuy, 2 Ala. 535; Stewart v. Anderson, 10 Ala. 504; Brodie v. Watkins, 31 Ark. 319; Winston v. Vaughan, 22 Ark. 72.

<sup>4</sup> Heflin v. Phillips (Ala.), 11 So. Rep. 729; Griffin v. Reynolds, 17 Ala. 198; Roebuck v. Duprey, 2 Ala. 535.

claims through or under the grantor. "Subsequent words in a deed should be very explicit to have the effect of withdrawing from the scope of the granting clause an incumbrance of the grantor's own creation."<sup>1</sup>

**838. Covenants created by statute from the use of certain words in a deed are strictly construed if the statute is in derogation of the common law.**<sup>2</sup>

Under a statute providing that the words "grant, bargain, sell" in a deed shall operate as an express covenant that the grantor was seised of "an estate," there is no implied covenant that he was seised in fee, though the habendum is, to have and to hold "in fee simple,"<sup>3</sup> or "to have and to hold the said land . . . forever as a good and indefeasible estate in fee simple."<sup>4</sup>

A statutory warranty implied from the use of certain words may be limited to a part of the lands conveyed by a subsequent clause declaring that the grantor's intention is to convey all his right, title, and interest in a part of the lands particularly designated.<sup>5</sup>

**839. A statutory covenant is not implied when a general covenant of warranty is inserted in a deed.**<sup>6</sup> "The covenants raised by law from the use of particular words are only intended to be operative where the parties themselves have omitted to insert covenants. But where the party declares how far he will be bound to warranty, that is the extent of his covenant."<sup>7</sup>

**840. A special covenant controls a general covenant, whether express or implied, on the same subject, where the two are inconsistent;**<sup>8</sup> but a special covenant does not restrict the scope of the general covenants any farther than the special clause is in conflict or covers the same ground. Thus a special covenant "against all taxes against us, or against our own acts in the premises," in a deed expressing or implying all the usual

<sup>1</sup> *Parish v. White*, 5 Tex. Civ. App. 71, 24 S. W. Rep. 572.

<sup>2</sup> *Douglass v. Lewis*, 131 U. S. 75, 9 S. Ct. Rep. 634; *Gratz v. Ewalt*, 2 Binn. 95; *Finley v. Steele*, 23 Ill. 56.

<sup>3</sup> *Cunningham v. Dillard*, 71 Miss. 61, 13 So. Rep. 882.

<sup>4</sup> *Wheeler v. Wayne Co.* 132 Ill. 599, 24 N. W. Rep. 625.

<sup>5</sup> *Kyle v. McKenzie*, 94 Ala. 236, 10 So. Rep. 654.

<sup>6</sup> *Douglass v. Lewis*, 131 U. S. 75, 9 Sup. Ct. Rep. 634; *Leddy v. Enos*, 6 Wash. 247, 33 Pac. Rep. 508, 34 Pac. Rep. 665; *Finley v. Steele*, 23 Ill. 56; *Weems v. McCaughan*, 7 Sm. & M. 422, 45 Am. Dec. 314.

<sup>7</sup> *Weems v. McCaughan*, 7 Sm. & M. 422, 427, 45 Am. Dec. 314.

<sup>8</sup> *Alexander v. Schreiber*, 10 Mo. 460; *Shelton v. Pease*, 10 Mo. 473, 482; *Collier v. Gamble*, 10 Mo. 467.

covenants for title, limits the general covenants against incumbrances and for quiet enjoyment, but not the general covenant of seisin.<sup>1</sup> The different covenants will be construed together and harmonized, if this can reasonably be done.<sup>2</sup>

Covenants of seisin and for quiet enjoyment, created by statute from the use of certain words in a deed, are operative to their full extent only when the parties have failed to insert covenants in these respects in the deed, and may be controlled and limited in their operation by express covenants in that regard.<sup>3</sup> Accordingly, where a deed contains statutory words which imply a covenant that the grantor "is seised of an indefeasible estate in fee simple," which is a covenant for a perfect title, and this is coupled in the deed with an express covenant that the land is free from incumbrances "made or suffered to be made by the grantor, or by any person claiming the same under him," the statutory covenant and the express covenant are incongruous and repugnant, and the express covenant must prevail.<sup>4</sup>

**841. An implied covenant against incumbrances raised by the use of the word "grant" is restrained by an express covenant against incumbrances limited by its terms to the heirs, executors, and administrators of the grantor, unto the grantee, his heirs and assigns. "Under the rule that covenants should be construed most strongly against the covenantor, courts have generally given effect to these implied covenants, even in cases where there were limited express covenants, where the two were not inconsistent or were independent of each other, limiting the implied covenant against incumbrances to the personal act or sufferance of the grantor."**<sup>5</sup>

But implied covenants do not arise when they are inconsistent

<sup>1</sup> *Jackson v. Green*, 112 Ind. 341, 14 N. E. Rep. 89; *Rowe v. Heath*, 23 Tex. 614; *James v. Adams*, 64 Tex. 193;

*Tracy v. Greffet*, 54 Mo. App. 562; *Brown v. Tomlinson*, 2 Greene (Iowa), 525.

<sup>2</sup> *James v. Adams*, 64 Tex. 193, 198.

<sup>3</sup> *Douglass v. Lewis*, 131 U. S. 75, 9 S. Ct. Rep. 634; *Gratz v. Ewalt*, 2 Binn. 95; *Stewart v. Anderson*, 10 Ala. 504; *Winston v. Vaughan*, 22 Ark. 72, 76 Am. Dec. 418; *Finley v. Steele*, 23 Ill. 56;

*Weems v. McCaughan*, 7 Sm. & M. 422, 45 Am. Dec. 314.

<sup>4</sup> *Douglass v. Lewis*, 131 U. S. 75, 9 S. Ct. Rep. 634.

<sup>5</sup> *Dun v. Dietrich*, 3 N. D. 3, 53 N. W. Rep. 81, per Bartholomew, J., citing *Gratz v. Ewalt*, 2 Binn. 95; *Seitzinger v. Weaver*, 1 Rawle, 377; *Funk v. Voneida*, 11 Serg. & R. 109, 14 Am. Dec. 617; *Shaffer v. Greer*, 87 Pa. St. 370; *Finley v. Steele*, 23 Ill. 56; *Alexander v. Schreiber*, 10 Mo. 460; *Shelton v. Pease*, 10 Mo. 473.

with the express covenants, or when it appears from the language used by the parties that it was not intended that any such covenant as that implied by the statute should take effect.<sup>1</sup>

### III. *Covenants for Seisin and Right to Convey.*

**842.** A covenant of seisin is defined to be "an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey," and extends not only to the land itself, but also to whatever is properly appurtenant to and passes by the conveyance of the land.<sup>2</sup> It is an assurance that the grantor has substantially the very estate, both in quantity and quality, which he professes to convey. It is broken if there is a material deficiency in the quantity of land called for by the deed. It is broken, also, if the grantor has not substantially the very estate he undertakes to convey. If he undertakes to convey the whole estate in fee absolutely, the covenant of seisin is of course broken if he has no estate; and it is broken if there is an outstanding estate in another, such as the estate of a life tenant.<sup>3</sup>

This covenant is in legal effect a covenant of title as well as a covenant of possession, and is broken unless the grantor's deed vests in the grantee an indefeasible estate in the land conveyed.<sup>4</sup> The grantee need not prove an ouster or eviction; it is sufficient to negative the covenant and prove that the grantor did not have title to the land at the time of the conveyance.<sup>5</sup>

The covenant of right to convey is practically synonymous with the covenant of seisin.<sup>6</sup>

<sup>1</sup> *Douglass v. Lewis*, 131 U. S. 75, 9 Sup. Ct. Rep. 634; *Finley v. Steele*, 23 Ill. 56; *Weems v. McCaughan*, 7 Sm. & M. 422, 45 Am. Dec. 314; *Dun v. Dietrich*, 3 N. D. 3, 53 N. W. Rep. 81.

<sup>2</sup> *Wetzel v. Richcreek* (Ohio), 40 N. E. Rep. 1004; *Real v. Hollister*, 20 Neb. 112, 29 N. W. Rep. 189.

<sup>3</sup> *Moore v. Johnston*, 87 Ala. 220, 6 So. Rep. 50.

<sup>4</sup> *Clapp v. Herdman*, 25 Ill. App. 509; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139; *Resser v. Carney*, 52 Minn. 397, 54 N. W. Rep. 89; *Lockwood v. Sturdevant*, 6 Conn. 373, 385; *Comstock v. Comstock*, 23 Conn. 349; *Moore v.*

*Johnston*, 87 Ala. 220; *Parker v. Brown*, 15 N. H. 176; *Mills v. Catlin*, 22 Vt. 98; *Catlin v. Hurlburt*, 3 Vt. 403; *Zent v. Picken*, 54 Iowa, 535, 6 N. W. Rep. 750; *Baker v. Hunt*, 40 Ill. 264, 89 Am. Dec. 346; *M'Carty v. Leggett*, 3 Hill, 134; *Fitch v. Baldwin*, 17 Johns. 161; *Recohs v. Younglove*, 8 Bax. 385; *Trice v. Kayton*, 84 Va. 217, 4 S. E. Rep. 377.

<sup>5</sup> *Rickert v. Snyder*, 9 Wend. 416.

<sup>6</sup> *Slater v. Rawson*, 1 Met. 450; *Raymond v. Raymond*, 10 Cush. 134; *Griffin v. Fairbrother*, 10 Me. 91; *Rickert v. Snyder*, 9 Wend. 416, 421; *Brandt v. Foster*, 5 Iowa, 287, 294.

843. In Massachusetts, Maine, and Ohio the covenant of seisin does not require an indefeasible title in the grantor, but only possession under color of title.<sup>1</sup> "If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee simple by a title adverse to the owner, he was seised in fee, and had a right to convey."<sup>2</sup>

844. An easement which does not interfere with the technical seisin of the purchaser does not constitute a breach of the covenant.<sup>3</sup> The existence of a public easement in the land or other equitable incumbrance is not a breach of this covenant, provided it does not interfere with the technical seisin of the grantee. A public right of way, for instance, is not inconsistent with the vesting of the freehold in the purchaser.<sup>4</sup> The occupation of the land by a railroad track under condemnation proceedings is only an easement, and cannot be relied upon as a breach of the covenant.<sup>5</sup>

The covenant is not broken by the existence of a subsequent written contract by the grantor to convey the land to another person; and it cannot be shown in support of such contract that it was made in pursuance of a previous oral agreement.<sup>6</sup>

845. A covenant of seisin in a warranty deed, wherein the grantor covenants "for his heirs, executors, and administrators," creates no liability on the part of the grantor for a breach of such covenant.<sup>7</sup>

<sup>1</sup> **Maine:** *Montgomery v. Reed*, 69 Me. 510; *Wilson v. Widenham*, 51 Me. 566; *Boothby v. Hathaway*, 20 Me. 251; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Griffin v. Fairbrother*, 10 Me. 91; *Wheeler v. Hatch*, 12 Me. 389; *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76. **Massachusetts:** *Slater v. Rawson*, 1 Met. 450; *Raymond v. Raymond*, 10 Cush. 134; *Cornell v. Jackson*, 3 Cush. 506; *Follett v. Grant*, 5 Allen, 174; *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Chapel v. Bull*, 17 Mass. 219; *Twambly v. Henley*, 4 Mass. 441. **Ohio:** *Stambaugh v. Smith*, 23 Ohio St. 584; *Great Western Stock Co. v. Saas*, 24 Ohio St. 542; *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Foote v. Burnet*, 10 Ohio, 317, 327, 36 Am. Dec. 90; *Robinson v. Neil*, 3 Ohio, 525; *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585.

<sup>2</sup> *Marston v. Hobbs*, 2 Mass. 433, 439, 3 Am. Dec. 61, per Parsons, C. J.

<sup>3</sup> *Blondeau v. Sheridan*, 81 Mo. 545.

<sup>4</sup> *Moore v. Johnston*, 87 Ala. 220, 6 So. Rep. 50; *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426.

<sup>5</sup> *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

<sup>6</sup> *Seckler v. Fox*, 51 Mich. 92, 16 N. W. Rep. 246.

<sup>7</sup> *Rufner v. McConnel*, 14 Ill. 168; *Traynor v. Palmer*, 86 Ill. 477; *Bowne v. Wolcott*, 1 N. Dak. 497, 48 N. W. Rep. 426, per Bartholomew, J.: "Courts cannot make contracts for parties, but must take them as they find them. If these covenants differ from usual covenants

Other decisions, however, hold that such a covenant imports the personal obligation of the covenantor.<sup>1</sup>

**846.** The covenant of seisin means, *ex vi termini*, the whole legal title, and nothing short of it will answer. A covenant of seisin is broken if the covenantor has not the possession, the right of possession, and the complete legal title.<sup>2</sup>

The covenant of seisin is not broken in case the title and possession of the land as described by metes and bounds passes by the deed, though the building thereon encroaches upon the adjoining land. The building in such case, so far as it encroaches upon other land, was not conveyed by the deed.<sup>3</sup>

**847.** There is a breach of the covenant of seisin if there is no land in existence such as the deed purports to convey.<sup>4</sup> But there is no breach in case the land exists and the grantor was seised of it at the time of the conveyance, and it can be identified by the description in the deed, though it is erroneously described as being in a certain city, when in fact, by reason of a change of the city limits, it was in another town.<sup>5</sup>

There is a breach of the covenant if the grantor does not own things affixed to the freehold, such as would pass to the grantee by a conveyance of the land itself.<sup>6</sup> A conveyance of land includes not only the naked earth, but everything within it, and the buildings, trees, fixtures, and fences upon it.<sup>7</sup>

**848.** A tax sale, so long as the right of redemption remains, is not a breach of the covenant of seisin. It is only an incumbrance.<sup>8</sup> But a covenant of seisin in a deed of vacant and unoc-

under the same circumstances, we are bound to presume that parties intend they should so differ. We are bound to presume that the grantee accepted this covenant because he could get no better. It may well be that the grantor was willing to bind his heirs and representatives to the extent of the estate that they might receive from him, but was unwilling to bind himself. The condition of the title in these cases makes that view all the more probable."

<sup>1</sup> *Smith v. Lloyd*, 29 Mich. 382; *Judd v. Randall*, 36 Minn. 12, 29 N. W. Rep. 589; *Hilmert v. Christian*, 29 Wis. 104.

<sup>2</sup> *Lockwood v. Sturdevant*, 6 Conn. 373; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429,

19 Am. Dec. 139; *Allen v. Allen*, 48 Minn. 462, 51 N. W. Rep. 473.

<sup>3</sup> *Stearn v. Hesdorfer*, 9 Misc. Rep. 134, 29 N. Y. Supp. 281; *Sasserath v. Metzgar*, 27 N. Y. Supp. 959; *Burke v. Nichols*, 1 Abb. Dec. 260.

<sup>4</sup> *Bacon v. Lincoln*, 4 Cush. 210, 1 Am. Dec. 765; *Basford v. Pearson*, 9 Allen, 387, 85 Am. Dec. 764.

<sup>5</sup> *Perry v. Clark*, 157 Mass. 330, 32 N. E. Rep. 226.

<sup>6</sup> *Mott v. Palmer*, 1 N. Y. 564; *West v. Stewart*, 7 Pa. St. 122.

<sup>7</sup> *Powers v. Dennison*, 30 Vt. 752.

<sup>8</sup> *Semple v. Whorton*, 68 Wis. 626, 32 N. W. Rep. 690; *Baldwin v. Ely*, 66 Wis. 171, 181, 28 N. W. Rep. 392.

cupied land is broken by the recording of a tax deed issued to a third person on a tax-sale certificate outstanding when the warranty deed was executed, as the recording of a tax deed on vacant land vests the grantee with the constructive possession.<sup>1</sup> The grantor may, however, contest the validity of such tax deed.<sup>2</sup>

**849.** The burden of proving a breach is on the plaintiff, who must set forth facts sufficient to constitute a cause of action.<sup>3</sup> "Where parties contract concerning lands on the presumption that one of them is the owner, it is a reasonable presumption that they have first satisfied themselves by inquiry what the title is; and, if a defect comes to their knowledge afterwards, the party complaining of it should point it out. The law cannot assume that defects exist when the parties concerned, who may fairly be supposed to have inquired into the facts, assume the contrary."<sup>4</sup>

But it is held when the plaintiff has alleged that the defendant was not seised of the land, and the defendant puts this allegation in issue by denial, the burden is upon him to show his seisin, and not upon the plaintiff to show that the defendant was not seised.<sup>5</sup>

**850.** If at the time of the conveyance the grantee finds the land in the possession of one claiming paramount title, the covenant of seisin is broken, and it is not necessary for the grantee, in order to recover for the breach, to prove actual eviction.<sup>6</sup>

In case the grantor has undertaken to convey unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee.<sup>7</sup>

**851.** A covenantee may maintain a suit upon the covenant

<sup>1</sup> *Daggett v. Reas*, 79 Wis. 60, 48 N. W. Rep. 127.

<sup>2</sup> *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. Rep. 405.

<sup>3</sup> *Landt v. Major* (Colo.), 31 Pac. Rep. 524; *Stearn v. Hesdorfer*, 9 Misc. Rep. 134, 29 N. Y. Supp. 281; *Woolley v. Newcombe*, 87 N. Y. 605, 612, overruling earlier New York cases; *Clapp v. Herdman*, 25 Ill. App. 509.

<sup>4</sup> *Ingalls v. Eaton*, 25 Mich. 32, per Cooley, J. Also, *Peck v. Houghtaling*, 35 Mich. 127; *Woolley v. Newcombe*, 87 N. Y. 605; *Jerald v. Elly*, 51 Iowa, 321, 1 N. W. Rep. 639.

<sup>5</sup> *Jerald v. Elly*, 51 Iowa, 321, 1 N. W. Rep. 639; *Blackshire v. Iowa Homestead Co.* 39 Iowa, 624; *Barker v. Kuhn*, 38 Iowa, 392; *Schofield v. Iowa Homestead Co.* 32 Iowa, 317.

<sup>6</sup> *Murphy v. Price*, 48 Mo. 247; *Adkins v. Tomlinson*, 121 Mo. 487, 26 S. W. Rep. 573; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Wetzel v. Richcreek* (Ohio St.), 40 N. E. Rep. 1004; *Matteson v. Vaughn*, 38 Mich. 373.

<sup>7</sup> *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. Rep. 405; *Nichol v. Alexander*, 28 Wis. 118.



of seisin, although at the time of bringing it he had parted with his title to the land. The covenant, if broken at all, was broken at the time of the conveyance. The covenantee is the only person who can maintain an action for a breach of the covenant, which is a non-assignable chose in action. If the covenantee discharges the liability which constituted a breach of the covenant, or in effect takes up the covenant for his own benefit, so that he is in a position to recover the money he has paid out to perfect his title, it does not matter that he has parted with the title to the property.<sup>1</sup>

#### IV. *Covenant against Incumbrances.*

**852.** An incumbrance within the meaning of the covenant is any interest in a third person consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of the property. It is not necessarily a lien, specific or determinable in amount.<sup>2</sup>

A covenant against incumbrances need not be expressed in any particular words. Thus a covenant "against all persons whomsoever, and all claims whatsoever," except a certain sum of money, is a covenant against incumbrances as well as a covenant of warranty. The word "claims," to the common understanding, would embrace all demands of a pecuniary nature existing against the land, with the exception mentioned; or, in other words, it means the incumbrances upon the land.<sup>3</sup>

**853.** Under a covenant that the grantor had "not done, or suffered to be done, anything whereby the said premises" are or may be in any manner incumbered, the grantor is liable only for his own act, or for an act within his control.<sup>4</sup> An incumbrance already upon the property when the grantor acquired title

<sup>1</sup> *Clement v. Bank*, 61 Vt. 298, 17 Atl. Rep. 717; *Cornell v. Jackson*, 3 Cush. 506.

<sup>2</sup> *Rawle*, Cov. §§ 75, 76, 191; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249; *Clark v. Fisher*, 54 Kans. 403, 38 Pac. Rep. 493; *Lafferty v. Milligan*, 165 Pa. St. 534, 30 Atl. Rep. 1030; *Barlow v. McKinley*, 24 Iowa, 69; *Harrison v. Des Moines & Ft. D. R. Co.* (Iowa) 58 N. W. Rep. 1081; *Carter v. Denman*, 23 N. J. L. 260; *Chapman v. Kimball*, 7 Neb.

399; *Stambaugh v. Smith*, 23 Ohio St. 584; *Huyck v. Andrews*, 113 N. Y. 81, 85, 20 N. E. Rep. 581; *Fritz v. Pusey*, 31 Minn. 368, 8 N. W. Rep. 94; *Warner v. Rogers*, 23 Minn. 34; *Post v. Campan*, 42 Mich. 90, 3 N. W. Rep. 272.

<sup>3</sup> *Johnson v. Hollensworth*, 48 Mich. 140, 11 N. W. Rep. 843. And see *Leddy v. Enos*, 6 Wash. 247, 33 Pac. Rep. 508.

<sup>4</sup> *Hobson v. Middleton*, 6 Barn. & C. 295; *Townson v. Green*, 2 Car. & P. 110; *Stannard v. Forbes*, 6 Adol. & E. 572.

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is not within such covenant.<sup>1</sup> In an action by a purchaser under such a covenant to recover taxes for the year in which the conveyance was made, he must allege and prove that the grantor was the owner on the day when the lien for the taxes attached to the property.<sup>2</sup>

854. This covenant is a protection only against incumbrances existing when the covenant was made. Thus where a purchaser assumed and agreed to pay a mortgage upon the land, and afterwards conveyed it by a deed in which he covenanted that it was free from all incumbrances made or suffered by him, but, this deed not having been recorded, he subsequently made a new mortgage to the holder of the mortgage he had assumed, for a similar amount, and the old mortgage was thereupon discharged, it was held that the new mortgage was not a breach of the covenant made in the mortgagor's deed. There was no incumbrance made or suffered by him at the time of his conveyance.<sup>3</sup>

855. A mortgage is of course an incumbrance within the meaning of this covenant. Any debt which by contract or statute is made a lien upon the land is an incumbrance, as, for instance, a judgment, an attachment. A lien at common law or in equity is an incumbrance. It is seldom that any controversy arises in regard to such an incumbrance, except in cases in which the covenant against incumbrances is in some way qualified with reference to a particular mortgage or other incumbrance named.

A general exception of a mortgage or other incumbrance from the operation of a deed qualifies all the covenants.<sup>4</sup> Thus where, immediately following the description, the land was declared to be subject to a mortgage described, and it was contended that, the mortgage not being excepted from the covenant against incumbrances, there was a breach of the covenant, it was held that the covenant did not apply to that incumbrance, which by the terms of the deed was excepted.<sup>5</sup> The words "subject to a

<sup>1</sup> *Parker v. Parker*, 93 Ala. 80, 9 So. Rep. 426; *Brown v. Young*, 69 Iowa, 625, 29 N. W. Rep. 941; *Cole v. Lee*, 30 Me. 392; *Comstock v. Smith*, 13 Pick. 116, 23 Am. Dec. 670; *Parish v. White*, 5 Tex. Civ. App. 71, 24 S. W. Rep. 572; *McIntyre v. De Long*, 71 Tex. 86, 8 S. W. Rep. 622; *Rhode v. Alley*, 27 Tex. 442.

<sup>2</sup> *Smith v. Eigerman* (Ind.), 31 N. E. Rep. 862.

<sup>3</sup> *Foster v. Woodward*, 141 Mass. 160, 6 N. E. Rep. 853.

<sup>4</sup> *Sweet v. Brown*, 12 Met. 175, 177, 45 Am. Dec. 243; *Sandwich Manuf. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. Rep. 379; *Jackson v. Hoffman*, 9 Cow. 271; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. Rep. 91.

<sup>5</sup> *Freeman v. Foster*, 55 Me. 508; *Kinnear v. Lowell*, 34 Me. 299.

mortgage" were used as a part of the description of the estate granted, and to that estate, thus qualified, the covenants apply.<sup>1</sup> Of course the same rule applies when the grant is made subject to certain easements; the covenant against incumbrances applies, not to an estate in fee, but to the fee diminished by the existing easements, which are excepted out of the grant.<sup>2</sup>

**856.** The exception of a mortgage of a certain amount, described also by the names of the parties and the record, is an exception of both the principal and interest of the incumbrance, and the purchaser, having been obliged to pay the interest as well as the principal to prevent a foreclosure, cannot maintain an action on the covenant against incumbrances on the ground that the principal only of the mortgage was excepted. The principal and interest constitute a single incumbrance.<sup>3</sup>

The costs of a foreclosure suit follow the mortgage incumbrance. Where a mortgage was excepted from all the covenants of a deed which was made in pursuance of a contract of sale, but before the delivery of the deed the holder of the mortgage commenced proceedings to foreclose it, and filed a notice of the pendency of the action, the payment by the grantee of accrued costs to procure a discontinuance of the suit was held not to be sufficient to support an action on the covenant. The proceedings to foreclose the mortgage were merely an incident to the mortgage incumbrance.<sup>4</sup>

**857.** A covenant against incumbrances may be qualified by a mortgage given by the purchaser to his grantor as a part of the same transaction. Thus, if the deed contains such a covenant, and a mortgage or deed of trust given by the grantee at the same time of the same land contains a special covenant that the mortgagor will pay all the taxes then existing on the land conveyed, the general covenant of the deed is qualified by the special covenant, so that the general covenant cannot be enforced.<sup>5</sup>

A general covenant is also qualified and limited by the terms

<sup>1</sup> *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. Rep. 382; *Hoxie v. Finney*, 16 Gray, 332; *Sweet v. Brown*, 12 Met. 175, 45 Am. Dec. 243.

<sup>2</sup> *Wood v. Boyd*, 145 Mass. 176, 13 N. E. Rep. 476.

<sup>3</sup> *Shanahan v. Perry*, 130 Mass. 460.

<sup>4</sup> *Monell v. Douglass*, 17 N. Y. Supp. 178; *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. Rep. 47.

<sup>5</sup> *Geer v. Redman*, 92 Mo. 375, 4 S. W. Rep. 745.

of the grant, and, this being only of the grantor's right, title, and interest, the covenant is restricted to such right.<sup>1</sup>

**858.** As a general rule, a restricted covenant does not affect the operation of a succeeding covenant not connected with it, or not of the same import with it.<sup>2</sup> Thus the fact that in the covenant against incumbrances a mortgage is excepted does not imply that the covenant of general warranty is to be restricted and made subject to such incumbrance. The two covenants are not connected, and are not of the same nature or import.<sup>3</sup> The exception in the covenant against incumbrances exempts the grantor from an action upon that particular covenant, and it can have no further effect. It is perfectly consistent for the grantor to warrant the title by a general covenant, though he has made the covenant against incumbrances subject to a mortgage.<sup>4</sup> "A prudent grantor may desire that the deed shall state the truth, and he is obliged to give the grantee notice of an incumbrance; and he may know or believe that the incumbrance will be removed before it ripens into a title which would be ground for an eviction, so that he might risk a warranty against an eviction, when he might be unwilling to take the risk of a present liability for a breach of the covenant against incumbrances."<sup>5</sup>

**859.** An exception of a mortgage following all the covenants is held to limit and restrain all the preceding covenants.<sup>6</sup>

<sup>1</sup> *Allen v. Holton*, 20 Pick. 458; *Sweet v. Brown*, 12 Met. 175, 45 Am. Dec. 243; *Blanchard v. Brooks*, 12 Pick. 47, 66; *Hoxie v. Finney*, 16 Gray, 332; *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. Rep. 382.

<sup>2</sup> *Howell v. Richards*, 11 East, 633; *Sandwich Manuf. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. Rep. 379; *Bennett v. Keehn*, 67 Wis. 154, 162, 29 N. W. Rep. 207, and 30 N. W. Rep. 112; *Rowe v. Heath*, 23 Tex. 614.

*Contra*, *Bricker v. Bricker*, 11 Ohio St. 240.

<sup>3</sup> *Estabrook v. Smith*, 6 Gray, 570, 572; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. Rep. 453.

<sup>4</sup> *Sandwich Manuf. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. Rep. 379; *Merritt v. Byers*, 46 Minn. 74, 48 N. W. Rep. 417; *Calkins v. Copley*, 29 Minn. 471; *Howell*

*v. Richards*, 11 East, 633; *Norman v. Foster*, 1 Mod. 101; *Smith v. Compton*, 3 B. & Ad. 189; *Duvall v. Craig*, 2 Wheat. 45, 58; *King v. Kilbride*, 58 Conn. 109, 19 Atl. Rep. 519; *Linton v. Allen*, 154 Mass. 432, 437, 28 N. E. Rep. 780; *Estabrook v. Smith*, 6 Gray, 570, 572, 577, 66 Am. Dec. 445; *Sumner v. Williams*, 8 Mass. 162, 202, 214, 5 Am. Dec. 83; *Donahoe v. Emery*, 9 Met. 63; *Cornell v. Jackson*, 3 Cush. 506; *Peters v. Grubb*, 21 Pa. St. 460; *Bennett v. Keehn*, 67 Wis. 154, 29 N. W. Rep. 207, 30 N. W. Rep. 112; *Dickinson v. Hoomes*, 1 Gratt. 302, 8 Gratt. 353; *Rowe v. Heath*, 23 Tex. 614.

<sup>5</sup> *Sandwich Manuf. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. Rep. 379, per *Vanderburgh, J.*

<sup>6</sup> *Morrison v. Morrison*, 38 Iowa, 73; *Bennett v. Keehn*, 67 Wis. 154, 29 N. W. Rep. 207, 30 N. W. Rep. 112.

"The rule is, however, that when the limitation is in a precedent covenant, it does not limit or restrict the subsequent covenants, unless it clearly appears from the whole deed that such was the intention of the parties."<sup>1</sup>

When the mortgage is not only excepted from the covenant against incumbrances, but the grantee expressly assumes and agrees to pay the mortgage, the mortgage is in effect excepted from the covenant of warranty; for the existence of the provision for the assumption of the mortgage shows that it was the intention of the parties that the grantee should pay it, and that the grantor was not to be called upon to warrant or indemnify the grantee against such mortgage.<sup>2</sup>

860. But if the covenant against incumbrances is qualified by the exception of a mortgage, and the subsequent covenant of warranty is qualified by a different specific exception, such as the taxes for a certain year, there is a still stronger reason for holding that the qualification in respect to the incumbrance does not extend to the covenant of warranty.<sup>3</sup> "The mere fact that the mortgages were excepted from the covenant as to incumbrances had not the effect to subject the land in the hands of the grantees to the satisfaction of the mortgages. Such exception, considered alone, merely limited the operation of the covenant as to incumbrances by excluding the mortgages therefrom.<sup>4</sup> We do not decide whether, if the covenants of warranty were in general terms, without being expressly restricted by the one specified exception of taxes, it should be construed to have been the intention of the parties that the express qualification of the covenant as to incumbrances should also be applicable to and limit the subsequent covenant of warranty.<sup>5</sup> But, whatever may be the proper construction of the covenants in such a case, that now before us is controlled by the fact that the covenant of

<sup>1</sup> *Bennett v. Keehn*, 67 Wis. 154, 167, per Taylor, J.

<sup>2</sup> *Lively v. Rice*, 150 Mass. 171, 22 N. E. Rep. 888; *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. Rep. 494.

<sup>3</sup> *Merritt v. Byers*, 46 Minn. 74, 48 N. W. Rep. 417.

<sup>4</sup> *Calkins v. Copley*, 29 Minn. 471, 13 N. W. Rep. 904.

<sup>5</sup> *Bricker v. Bricker*, 11 Ohio St. 240, may be referred to as supporting the view

that the latter covenant should be thus qualified by intentment. Opposed to this are *Estabrook v. Smith*, 6 Gray, 570; *King v. Kilbride*, 58 Conn. 109, 19 Atl. Rep. 519. See, also, *Bennett v. Keehn*, 67 Wis. 154, 30 N. W. Rep. 112; *Sumner v. Williams*, 8 Mass. 162, 202; *Duval v. Craig*, 2 Wheat. 45; *Rowe v. Heath*, 23 Tex. 614; *Norman v. Foster*, 1 Mo. 101; *Howell v. Richards*, 11 East, 633, 3 Washb. Real Prop. 672.

warranty is qualified by one express exception, no allusion being there made to the mortgages. These covenants were formally made and accepted for the purpose of expressing the obligations and rights of the parties. Their attention being directed to the necessity of stating the conditions or qualifications which were to restrict the general language and effect of this important covenant, they made one specific exception. This forbids that another exception be added to that by mere uncertain implication. From the fact that the covenantor was unwilling to covenant that the land was not at the time of the conveyance incumbered by these mortgages, the inference does not necessarily follow that he did not intend to warrant and defend the title even as against such mortgages."<sup>1</sup>

And so, where a second mortgage of land recited that the land was "conveyed subject to" a certain right of drainage, a certain easement, "and the mortgage hereinafter named," and the grantor covenanted that he was seised in fee of the "aforegranted premises;" that they were free from all incumbrances "except a certain mortgage," describing it, "the right of drainage, and the easement aforesaid;" that he had good right to sell and convey the same; and that he would warrant and defend the same "against the lawful claims and demands of all persons, except the right of drainage and the easement aforesaid," — it was held that the covenant of warranty included the first mortgage.<sup>2</sup>

861. Parol evidence is not admissible to contradict or control a covenant against incumbrances by showing that the parties agreed that a particular incumbrance, not expressly excepted in the deed, was orally excepted, or that the grantee

<sup>1</sup> *Merritt v. Byers*, 46 Minn. 74, 48 N. W. Rep. 417, per Dickinson, J.

<sup>2</sup> *Ayer v. Philadelphia, &c. Face Brick Co.* 157 Mass. 57, 31 N. E. Rep. 717. Holmes, J., said: "If the granting part of the deed stood as now, and was followed by general covenants with no exceptions, the warranty would be held to be limited to what purported to be conveyed, — that is, to the land subject to the mortgage, etc., — and would not extend to the mortgage. *Brown v. Bank*, 148 Mass. 300, 304, 19 N. E. Rep. 382; *Freeman v. Foster*, 55 Me. 508; *Jackson v. Hoffman*, 9 Cow. 271, 273. On the

other hand, if the granting part simply described the land, not mentioning the mortgage, and the covenants were in their present form, the warranty would extend to the mortgage, and the demandants would be entitled to prevail." *Estabrook v. Smith*, 6 Gray, 572, 66 Am. Dec. 445. But when the grantor says that he will warrant and defend "against the lawful claims and demands of all persons, except the right of drainage and the easement aforesaid, a majority of the court feel bound to take his words as binding him to warrant against the prior mortgage."

orally agreed to assume such incumbrance. Such evidence would have the effect of varying and contradicting the written deed, unless it appeared that the exception was omitted through fraud or accident, which would be ground for reforming the deed.<sup>1</sup>

The legal effect of a covenant against incumbrances cannot be cut down or varied by proof of an oral agreement by the grantee to pay an assessment then existing upon the land.<sup>2</sup>

**862.** An attempt has been made to establish an exception to this general rule of law. In Indiana it has been held in some cases that proof is admissible to show that an existing incumbrance was agreed by the parties not to be embraced within the covenant against incumbrances, and that the price paid was what the parties agreed upon as the purchase-price subject to the incumbrance. Thus, if one buys land incumbered by a railroad right of way, and takes a deed of general warranty therefor without excepting the incumbrance, it may be proven that the price paid was what the parties agreed upon as the purchase-price subject to the incumbrance. It may be proved that the grantee agreed, as a part of the consideration, to pay an existing incumbrance.<sup>3</sup>

<sup>1</sup> *Illinois*: *Sidders v. Riley*, 22 Ill. 109; *Wadhams v. Innis*, 4 Ill. App. 642. *Indiana*: *Bever v. North*, 107 Ind. 544, 8 N. E. Rep. 576; *Morehouse v. Heath*, 99 Ind. 509; *Rinehart v. Rinehart*, 91 Ind. 89. See the following section. *Iowa*: *Evans v. Duncan*, 82 Iowa, 401, 48 N. W. Rep. 922; *Johnson v. Walter*, 60 Iowa, 315, 14 N. W. Rep. 325; *Gerald v. Elley*, 45 Iowa, 322; *Van Wagner v. Van Nostrand*, 19 Iowa, 422. *Maine*: *Donnell v. Thompson*, 10 Me. 170, 177, 25 Am. Dec. 216; *Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 30. *Massachusetts*: *Flynn v. Bourneuf*, 143 Mass. 277, 9 N. E. Rep. 650; *Howe v. Walker*, 4 Gray, 318; *Estabrook v. Smith*, 6 Gray, 570, 578, 66 Am. Dec. 445; *Spurr v. Andrew*, 6 Allen, 420; *Batchelder v. Sturgis*, 3 Cush. 201; *Raymond v. Raymond*, 10 Cush. 134; *Harlow v. Thomas*, 15 Pick. 66, 69; *Leland v. Stone*, 10 Mass. 459; *Townsend v. Weld*, 8 Mass. 146. The cases of *Carr v. Dooley*, 119 Mass. 294, and *McCormick v. Cheevers*, 124 Mass. 262, do not decide other-

wise, but deal with attempts to add a further obligation to those assumed by the covenant, and not with an attempt to cut down the covenant. *Minnesota*: *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. Rep. 861. *Missouri*: *McLeod v. Skiles*, 81 Mo. 595; *Patterson v. Yancy*, 81 Mo. 379; *Laudman v. Ingram*, 49 Mo. 212. *New York*: *Suydam v. Jones*, 10 Wend. 180, 185, 25 Am. Dec. 552; *Duncan v. Blair*, 5 Denio, 196. *Ohio*: *Long v. Moler*, 5 Ohio St. 271. *Pennsylvania*: *Collingwood v. Irwin*, 3 Watts, 306. *Texas*: *Bigham v. Bigham*, 57 Tex. 238. *Vermont*: *Beach v. Packard*, 10 Vt. 96, 33 Am. Dec. 185.

<sup>2</sup> *Simanovich v. Wood*, 145 Mass. 180, 13 N. E. Rep. 391; *Flynn v. Bourneuf*, 143 Mass. 277, 9 N. E. Rep. 650.

<sup>3</sup> *Maris v. Iles* (Ind. App.), 30 N. E. Rep. 152. The court say: "In this view it is quite immaterial whether there was a mistake or not in omitting to except the right of way from the conveyance. It affects the consideration only, and this may always be inquired into, except to the ex-

These decisions proceed upon the ground that they constitute an exception to the well-recognized rule that a grantor cannot contradict the terms of a deed by parol evidence; that the deed as executed is the contract of the parties. The exception is that parol evidence is admissible to prove the true consideration paid, except where the deed itself fully and specifically states the consideration.<sup>1</sup>

**863.** The scope and application of covenants in a deed cannot be varied or restricted by parol evidence. Thus, where land was conveyed with a covenant against incumbrances for one entire pecuniary consideration expressed in the deed and actually paid, evidence is not admissible, in defence, to an action on such covenant, of a prior parol agreement to the effect that, as to a part of the granted land upon which an incumbrance rested, the consideration was not applicable, but that the conveyance was gratuitous. The purpose of such evidence is not to show the real consideration paid, but to show that the consideration was in fact paid wholly for a part of the land, and that another part of the land conveyed as an entirety, and designated only by this parol evidence, was conveyed gratuitously, none of the price paid being applicable to that, and hence that the covenantor was not legally liable to respond in substantial damages for any defect of title, or for any incumbrance in respect thereto.<sup>2</sup>

A grantor is not allowed to contradict his covenants by showing by parol that a third person who was the real purchaser agreed to pay the incumbrances for a breach of which the grantor is sued. He cannot show that the agreement of sale was made with another person, and that plaintiff's name was inserted as

tent to which it affects the validity of the conveyance. If the grant to the railroad had been for the fee, the covenants of title and seisin would have been involved, and parol evidence would not have been admissible to show that the land was actually excepted by the conveyance. But another rule applies to incumbrances." And see *Bever v. North*, 107 Ind. 544, 8 N. E. Rep. 576; *Hays v. Peck*, 107 Ind. 389, 8 N. E. Rep. 274; *McDill v. Gunn*, 43 Ind. 315; *Carver v. Louthain*, 38 Ind. 530; *Pea v. Pea*, 35 Ind. 387; *Fitzer v.*

*Fitzer*, 29 Ind. 468; *Pitman v. Conner*, 27 Ind. 337; *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352.

<sup>1</sup> This attempted distinction has given risen to a vast amount of litigation in Indiana, and this fact alone is sufficient to indicate that the distinction is shadowy. It seems clear that the exception to the general rule of law on this subject should never have been entertained.

<sup>2</sup> *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. Rep. 861.



grantee simply as security to him for money advanced to the third person with which to make the purchase.<sup>1</sup>

**864.** A covenant cannot be extended or enlarged any more than it can be restricted by a parol agreement made at the time of the execution of the deed. Thus, where one conveys land by a quitclaim deed, wherein he covenants only against the demands of all persons claiming under himself, the grantee cannot show an oral promise by the grantor made at the same time and for the same consideration as the deed, to discharge an incumbrance not made by him.<sup>2</sup>

**865.** A covenant by a grantee of land, as part of the consideration of the deed, to pay the incumbrances on the land, cannot be enforced by a stranger to the covenant. Only a person for whose benefit the covenant was made, or whose benefit was within the contemplation of the parties, can enforce it. Moreover, the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance.<sup>3</sup>

Such a covenant is not a promise for the benefit of the grantor's widow who did not join in the deed, but whose dower right was expressly reserved, although the incumbrance which the purchaser covenanted to pay is a mortgage in which she had released her inchoate right of dower, and therefore had an interest that the mortgage should be paid without resort to the land, so that her inchoate right of dower might be freed therefrom. The husband, however, owed her no duty enforceable in law or equity to pay the mortgages to relieve her dower.<sup>4</sup>

<sup>1</sup> *Evans v. Duncan*, 82 Iowa, 401, 48 N. W. Rep. 922.

<sup>2</sup> *Howe v. Walker*, 4 Gray, 318. A dictum by Wilde, J., in *Preble v. Baldwin*, 6 Cush. 549, that an agreement by the purchaser to pay certain taxes that might be thereafter assessed upon the land might be proved, did not vary the covenant against incumbrances, is of no weight, because the effect of the covenant was not under consideration. See comment of Holmes, J., in regard to it in *Flynn v. Bourneuf*, 143 Mass. 277, 9 N. E. Rep. 650.

<sup>3</sup> *Garnsey v. Rogers*, 47 N. Y. 233; *Vrooman v. Turner*, 69 N. Y. 280; *Loril-*

*lard v. Clyde*, 122 N. Y. 498, 25 N. E. Rep. 917.

<sup>4</sup> *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. Rep. 49, 15 N. Y. Supp. 344. The plaintiff sought to sustain her right of recovery here, upon the principle laid down in the case of *Lawrence v. Fox*, 20 N. Y. 268, which may be stated to be that, if one person upon good consideration make a promise to another for the benefit of a third person, that third person may maintain an action upon the promise. In the lower court *Rumsey, J.*, said on this point: "The courts, however, have become somewhat afraid of the principle of *Lawrence v. Fox*, and have very decidedly declared that it should not be extended to

Where the grantee has covenanted to pay an existing incumbrance, if the grantor and grantee afterwards unite in a quitclaim deed of the premises to a third person, the covenant of the first grantee to pay the incumbrances is thereby revoked as between the parties, and as to all persons not having acquired vested rights under the covenant.<sup>1</sup>

**866. A covenant against incumbrances cannot be enforced after the covenantor has himself removed the incumbrance.** Thus, where the land conveyed with such a covenant was subject to a mortgage, which, in accordance with an agreement between the parties at the time, was subsequently paid by the conveyance of other land by the grantor to the grantee, as between the parties, and so far as the covenant is concerned, such conveyance was a payment of the mortgage.<sup>2</sup>

**867. A right of dower, whether inchoate or consummate, is an incumbrance within the covenant against incumbrances.<sup>3</sup>**

**868. A lease outstanding is an incumbrance.** The grantee's interest in the property purchased is diminished to the extent of the rights given by the lease, and it is consequently a breach of the covenant against incumbrances.<sup>4</sup>

If the tenant attorns to the purchaser, there is no longer a breach of the covenant by reason of the tenancy. The same result follows under a statute which establishes the relation of landlord and tenant between the purchaser and tenant.<sup>5</sup> Where

new cases; indeed, the tendency has been for some time to limit the application of the rule with great strictness. *Pardee v. Treat*, 82 N. Y. 385, 392; *Wheat v. Rice*, 97 N. Y. 296, 302. It is now well settled that no action can be maintained under the principle of the *Lawrence* case unless there was a debt or duty owing by the promisee to the party claiming to sue upon the promise. *Vrooman v. Turner*, 69 N. Y. 280, 285."

<sup>1</sup> *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. Rep. 49, 15 N. Y. Supp. 344.

<sup>2</sup> *Johnston v. Markle Paper Co.* 153 Pa. St. 189, 25 Atl. Rep. 560.

<sup>3</sup> *Harrington v. Murphy*, 109 Mass. 299; *Bigelow v. Hubbard*, 97 Mass. 195; *Shearer v. Ranger*, 22 Pick. 447; *Mars-ton v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Bickford v. Page*, 2 Mass. 455; *Runnells*

*v. Webber*, 59 Me. 488; *Blanchard v. Blanchard*, 48 Me. 174; *Smith v. Cannell*, 32 Me. 123; *Ward v. Ashbrook*, 78 Mo. 515; *Durrest v. Piper*, 58 Mo. 551; *Russ v. Perry*, 49 N. H. 547; *Hudson v. Steere*, 9 R. I. 106; *McAlpin v. Woodruff*, 11 Ohio St. 120; *Hatcher v. Andrews*, 5 Bush, 561; *Lessly v. Bowie*, 27 S. C. 193, 3 S. E. Rep. 199.

<sup>4</sup> *Clark v. Fisher*, 54 Kans. 403, 38 Pac. Rep. 493; *Smith v. Davis*, 44 Kans. 362, 24 Pac. Rep. 428; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. Rep. 94; *Batchelder v. Sturgis*, 3 Cush. 201; *Porter v. Bradley*, 7 R. I. 538; *Grice v. Scarborough*, 2 Spear (S. C.), 649, 42 Am. Dec. 391; *Smith v. Scribner*, 59 Vt. 96, 7 Atl. Rep. 711.

<sup>5</sup> *Kellum v. Berkshire L. Ins. Co.* 101 Ind. 455.

the fact of the tenancy was known to the purchaser at the time of the purchase, there is no breach of the covenant in States where the rule is recognized that the purchaser's knowledge of an incumbrance takes it out of the operation of the covenant.<sup>1</sup>

Where the purchaser has relied upon the grantor's representation, which was false, that the tenant had agreed to give immediate possession, he may maintain an action upon this extraneous contract, which is separate and distinct from the covenant in the deed.<sup>2</sup>

**869. Taxes are an incumbrance within the covenant from the time they become a lien upon the land, whether this be from the date of the assessment or from a time fixed by statute, though they have not become due and payable at the time of the conveyance.<sup>3</sup> The grantee may pay such taxes before any attempt is made to collect them by a sale of the land, and recover the amount from his grantor under the covenant.<sup>4</sup> But in that case the grantee must be able to show that the taxes were properly assessed and are a lien upon the property. He takes the burden, in a suit for a breach of this covenant, of showing the validity of the incumbrance. This rule applies even after a tax sale and a purchase under it; for if the tax sale was illegal, it operates to discharge the taxes without conferring any rights upon the purchaser at the tax sale. Thus it was held that there was no breach of the covenant where the grantee voluntarily paid to the purchaser at the tax sale the amount of his bid and interest, and so extinguished any right which the purchaser might have had to recover back from the collector or town the money paid by him on his bid, in case the sale proved inoperative to convey title to the land bid off, and also extinguished any right which by possibility might**

<sup>1</sup> *Lindley v. Dakin*, 13 Ind. 388; *Page v. Lashley*, 15 Ind. 152.

<sup>2</sup> *Williams v. Frybarger* (Ind.), 37 N. E. Rep. 302.

<sup>3</sup> *Fuller v. Jillette*, 9 Biss. 296; *Campbell v. McClure* (Neb.), 63 N. W. Rep. 920; *McClure v. Campbell*, 25 Neb. 57, 40 N. W. Rep. 595; *Lindsay v. Eastwood*, 72 Mich. 336, 40 N. W. Rep. 455; *Hill v. Bacon*, 110 Mass. 387; *Coburn v. Litchfield*, 132 Mass. 449; *Cochran v. Guild*, 106 Mass. 29; *Cadmus v. Fagan*, 47 N. J.

L. 549, 4 Atl. Rep. 323; *Long v. Moler*, 5 Ohio St. 271; *Plowman v. Williams*, 6 Lea, 268; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Mitchell v. Pillsbury*, 5 Wis. 407.

<sup>4</sup> *Leddy v. Enos*, 6 Wash. 247, 33 Pac. Rep. 508, dissenting opinion, 34 Pac. Rep. 665; *Campbell v. McClure* (Neb.), 63 N. W. Rep. 920; *Hutchins v. Moody*, 34 Vt. 433; *Turner v. Goodrich*, 26 Vt. 707.

have arisen to the collector to proceed anew against the land for the payment of the taxes.<sup>1</sup>

870. By statute in some States, taxes do not become a lien upon the land until a fixed time after the assessment. Under such a statute the assessment does not make the taxes an incumbrance. Prior to the date fixed by statute, there exists nothing but a liability of the land to a future lien, though the taxes have been assessed. An assessment is not an incumbrance, prior to such date, within the import of a covenant against incumbrances in a conveyance.<sup>2</sup>

Taxes assessed after the sale of land under a contract are not an incumbrance suffered by the grantor.<sup>3</sup> Taxes which were not payable at the date of the conveyance, though they were then a lien upon the realty, have been held not to be an incumbrance within the scope of such a covenant.<sup>4</sup>

A covenant of warranty against acts done or suffered by the grantor protects the purchaser from taxes lawfully levied on the property, and existing as a lien at the time of the conveyance.<sup>5</sup>

Where the incumbrance is in the form of taxes upon the property for which it is sold, the grantor cannot set up in defence to an action upon the covenant that the land had been already lost to the grantee by a sale under his own mortgage, before it was sold for the taxes which the grantor had left delinquent, if the decree foreclosing the mortgage provides for redemption, and the grantee shows a satisfaction of the mortgage entered pending the trial.<sup>6</sup>

871. Assessments for street improvements which have not been laid at the time of a conveyance, though the improvements have already been made, are not within a covenant against incumbrances. Until the amount of a tax is ascertained in the manner prescribed by law, no lien or incumbrance exists by reason thereof.<sup>7</sup>

<sup>1</sup> *Cummings v. Holt*, 56 Vt. 384, 387, per Ross, J.

<sup>2</sup> *Bradley v. Dike* (N. J.), 32 Atl. Rep. 132. In New Jersey the assessment is made on the 20th of May, and the taxes become a lien on the 20th of December. *Atchison, T. & Santa Fé R. Co. v. Jaques*, 20 Kans. 639.

<sup>3</sup> *Gheen v. Harris* (Pa. St.), 32 Atl. Rep. 1094.

<sup>4</sup> *Smith v. Eigerman*, 5 Ind. App. 269, 31 N. E. Rep. 862.

<sup>5</sup> *Milot v. Reed*, 11 Mont. 568, 29 Pac. Rep. 343.

<sup>6</sup> *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. Rep. 69.

<sup>7</sup> *Lathers v. Keogh*, 109 N. Y. 583, 17 N. E. Rep. 131; *Gotthelf v. Stranahan*, 138 N. Y. 345, 34 N. E. Rep. 286; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. Rep.

A municipal claim for laying water-pipes, not entered of record so as to preserve its lien, is not an incumbrance upon the land in the hands of a subsequent purchaser.<sup>1</sup>

872. But, on the other hand, such assessments are an incumbrance from the time the improvements were made, according to the decisions in some States. The burden or incumbrance was then imposed upon the land, to be a specific lien in amount so soon as the proceedings to ascertain the amount should be completed. It is immaterial that the exact amount of the incumbrance was not ascertained at the time of the sale and execution of the deed. The Supreme Court of Pennsylvania say:<sup>2</sup> "The right of the city to assess the lot for the improvement already made, and to thereby diminish its value, was known: the exact weight of the burden it might impose was not precisely known; so far as concerned the city, that could only be determined by the statutory proceeding before the board of viewers. But that, when the proceeding was had, the event would be a lien for a greater or less amount on this lot was plain from its relation to the costly improvement. A mechanic who has expended his labor on a house has his right to a lien for the value of the labor. The value, if there be no contract price, cannot be determined until the lien be filed, and then perhaps not definitely until judgment on *scire facias*; but if the lien be not filed until the last day of the six months, that fact does not affect the right, during the interval, to impose the burden: the incumbrance is there, indefinite as to amount, because of indefiniteness of opinion as to the value of the labor; but there is absolute certainty of opinion as to the labor having some value, for there stands the house, the product of the mechanic's labor. Here the improvement of the street on which this lot fronted had been completed. The event

1104, affirming 57 Hun, 430; Harper v. v. Beebe, 24 Kans. 343. In Lathers v. Dowdney, 113 N. Y. 644, 21 N. E. Rep. Keogh, 109 N. Y. 583, 17 N. E. Rep. 63, 47 Hun, 227; Dowdney v. Mayor, 54 131, the court, by Gray, J., distinguish the cases De Peyster v. Murphy and Barlow v. St. Nicholas Nat. Bank, *supra*, limiting also the decision in the latter. 563; Barlow v. St. Nicholas Nat. Bank, Rundell v. Lakey, 40 N. Y. 513, is also reviewed.  
63 N. Y. 399, 20 Am. Rep. 547; Fisher v. Mayor, 67 N. Y. 73; Association of Colored Orphans v. Mayor, 104 N. Y. 581, 12 N. E. Rep. 279; Tull v. Royston, 30 Kans. 617, 2 Pac. Rep. 866; Sloan

<sup>1</sup> Stutt v. Building Asso. 12 Pa. Co. Ct. 344.

<sup>2</sup> Lafferty v. Milligan, 165 Pa. St. 534, 538.

demonstrated that the burden imposed by the act was a very heavy one: but whether, at the date of the deed, it appeared light or heavy, it was obvious it could not escape assessment; therefore there was upon it an incumbrance."<sup>1</sup>

**873.** It seems that every easement except that of a public highway, in some States, is an incumbrance within the covenant against incumbrances. "An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use of or over the estate of another." This is an interest in a third person which injuriously affects the value of the land, within the terms of the definition of an incumbrance.<sup>2</sup>

**874.** The right to flow water back upon the land of another is an incumbrance on the land flowed, or subject to be flowed, if the right has been acquired by an agreement or settlement of damages for the flowage binding upon all subsequent owners.<sup>3</sup> If the right to damages under a mill act passes to each successive owner of the land as an incident, the right of flowage may not be an incumbrance upon the land;<sup>4</sup> but if a proprietor deprives his estate of this incident, as he may do by a grant of the right perpetually, he thereby incumbers his estate by his own act. But an unsealed receipt given by the owner of the land subject to flowage under the mill act, acknowledging full payment for damages, and a full discharge from liability for any flowage, does not bind a subsequent owner, and there is not in such case any incumbrance upon the land in the hands of a subsequent purchaser by reason of such flowage.<sup>5</sup>

<sup>1</sup> **Pennsylvania:** The liability arises from the time the improvement was made. *Lafferty v. Milligan*, 165 Pa. St. 534, 538, 30 Atl. Rep. 1030, 35 W. N. C. 551, per Dean, J.; *Devine v. Rawle*, 148 Pa. St. 208, 23 Atl. Rep. 1119. **New Jersey:** The same rule applies. *Hartshorn v. Cleveland*, 52 N. J. L. 473, 19 Atl. Rep. 974; *Fagan v. Cadmus*, 46 N. J. L. 441; *Cadmus v. Fagan*, 47 N. J. L. 549, 4 Atl. Rep. 323. **Massachusetts:** The liability arises from the date of the order for the improvement, or for laying out the street. *Carr v. Dooley*, 119 Mass. 294; *Blackie v. Hudson*, 117 Mass. 181; *Prince v. Boston*, 111 Mass. 226; *Jones v. Boston*, 104

Mass. 461; *Coburn v. Litchfield*, 132 Mass. 449.

<sup>2</sup> *Huyck v. Andrews*, 113 N. Y. 81, 20 N. E. Rep. 581; *Quick v. Taylor*, 113 Ind. 540, 16 N. E. Rep. 588; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249, per Parsons, C. J.; *Edmunds' App.* (Pa.) 8 Atl. Rep. 31; *Post v. Campau*, 42 Mich. 90, 3 N. W. Rep. 272.

<sup>3</sup> *Isele v. Arlington Five Cents Sav. Bank*, 135 Mass. 142; *Isele v. Schwamb*, 131 Mass. 337.

<sup>4</sup> *Fitch v. Seymour*, 9 Met. 462; *Seymour v. Carter*, 2 Met. 520.

<sup>5</sup> *Craig v. Lewis*, 110 Mass. 377.

A right in another to dam up and use the waters of a stream upon the lands conveyed is an incumbrance, for which an action may be maintained on the covenant.<sup>1</sup>

The right to take water, by means of a pipe laid beneath the ground, from a spring on the granted land, is an incumbrance embraced within the covenant.<sup>2</sup> But if the right to take water and maintain pipes is a mere license, revocable at any time, it is not an incumbrance within the covenant.<sup>3</sup>

An easement to maintain a stairway is an incumbrance.<sup>4</sup>

A beam right in favor of adjoining premises, created by an agreement in writing under seal, and to continue until the wall is destroyed in any manner or torn down for the purpose of rebuilding, is an easement in favor of the adjoining property and constitutes an incumbrance.<sup>5</sup>

**875.** A restriction as to the kind of building that may be erected upon the land is an incumbrance that diminishes its value.<sup>6</sup> "It is not a mere technical incumbrance, which does not interfere with the present enjoyment of the land, like a right of dower, which may never have any operative force by reason of depending upon a contingency that may never occur. The weight of it is as oppressive now as it ever can be. It is a present and continuing impairment of the free enjoyment of the land, and a legal obstruction to the exercise of that dominion over it to which the plaintiff, as the lawful owner, is entitled. The restriction may not interfere with the use of the land for many purposes, but it is an absolute prohibition of its use for others, for which the plaintiff might otherwise lawfully use it. As the owner, he would have the right to use it for any lawful purpose; but, by reason of this incumbrance, its use in the prohibited mode would work a forfeiture of the entire title. The damages can be estimated as well now as at the end of twenty years. They may be inconsiderable or merely nominal, and they may be sub-

<sup>1</sup> *Huyck v. Andrews*, 113 N. Y. 81, 20 N. E. Rep. 581; *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224.

<sup>2</sup> *McMullin v. Wooley*, 2 Lans. 394. And see *Morgan v. Smith*, 11 Ill. 194; *Mitchell v. Warner*, 5 Conn. 497.

<sup>3</sup> *Johnson v. Knapp*, 150 Mass. 267, 23 N. E. Rep. 40, 146 Mass. 70, 15 N. E. Rep. 134.

<sup>4</sup> *McGowen v. Myers*, 60 Iowa, 256, 14 N. E. Rep. 788.

<sup>5</sup> *Schaeffler v. Miehling*, 13 Misc. 520, 34 N. Y. Supp. 693.

<sup>6</sup> *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. Rep. 303; *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Doctor v. Darling*, 22 N. Y. Supp. 594; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249.

stantial, but it is for the jury to determine the amount of damages which the plaintiff ought to receive."<sup>1</sup>

Evidence that the restrictions would not be enforced in equity, by reason of the change that had taken place in the neighborhood as to the use of property, is not admissible when offered as a defence to the action, and not as bearing upon the amount of damages.<sup>2</sup>

A restriction, requiring the setting back of all buildings that may be erected a specified distance from the street, is a breach of the covenant against incumbrances the instant the deed is executed.<sup>3</sup>

**876.** A restriction against the use of the property for any special business is an incumbrance, and should be excepted from the covenants of the deed unless the grantor is willing to covenant against it.<sup>4</sup> But a general restriction against nuisances is not an incumbrance within the covenant, although the restriction is so vague as possibly to invite unfounded litigation. Such a restriction does not increase the purchaser's liability.<sup>5</sup>

**877.** A party-wall agreement in the usual form is an incumbrance until the wall has been wholly paid for.<sup>6</sup> After a party-wall has been built, half on the land of each adjoining owner and wholly paid for by each, the mutual and reciprocal easement of each owner that his wall shall receive support from the part of the wall on the adjoining land is not an incumbrance.<sup>7</sup>

A party-wall wholly on one of two contiguous lots of land, yet subject to appropriation and use for all purposes of a party-wall by the owner of the other lot, is an incumbrance upon the land.<sup>8</sup>

**878.** A natural easement is not an incumbrance within the meaning of the covenant, nor is a further easement incidental to such natural easement. Thus the owner of land on a stream

<sup>1</sup> *Foster v. Foster*, 62 N. H. 46, 56, per Clark, J.

<sup>2</sup> *Doctor v. Darling*, 22 N. Y. Supp. 594.

<sup>3</sup> *Roberts v. Levy*, 3 Abb. Pr. N. S. 311.

<sup>4</sup> *Floyd v. Clark*, 7 Abb. N. C. 136.

<sup>5</sup> *Floyd v. Clark*, 7 Abb. N. C. 136.

<sup>6</sup> *Burr v. Lamaster*, 30 Neb. 688, 46 N. W. Rep. 1015; *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. Rep. 702; *Savage*

*v. Mason*, 3 Cush. 500. Otherwise where a statute gives the right, as in Iowa: *Bertram v. Curtis*, 31 Iowa, 46. So when the wall is built entirely upon the land of one owner. *Mohr v. Parmelee*, 11 Jones & S. 320.

<sup>7</sup> *Hendricks v. Starks*, 37 N. Y. 106.

<sup>8</sup> *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. Rep. 749; *Mohr v. Parmelee*, 11 Jones & S. 320.



has a natural easement in the land below for the flow of the water in its natural channel. Where, therefore, the land conveyed was described as land through which the water from a mill passed, it was held that the right of the mill-owner to enter upon the land and cleanse the channel of the stream was implied, and would not constitute a breach of the covenant against incumbrances. This secondary easement was essential to the enjoyment of the natural easement.<sup>1</sup>

**879.** The existence of a private right of way is a breach of the covenant.<sup>2</sup> A grantor, after having conveyed land with a covenant against incumbrances, is estopped to maintain an action against his grantee for obstructing a way across the land which he has not excepted or reserved in the deed, but has covenanted not to exist.<sup>3</sup>

**880.** A right of way for a railroad, which is in possession of such right, may constitute a breach both of the covenant for quiet enjoyment and of the covenant against incumbrances; and, upon such a case being shown, the plaintiff is not required to elect upon which covenant he will seek a recovery.<sup>4</sup> It is a breach of the covenant against incumbrances for which the grantee is entitled to immediate action.<sup>5</sup>

**881.** That a public highway is an incumbrance is declared in numerous decisions.<sup>6</sup> "It is a legal obstruction to the purchaser to exercise that dominion over the land to which the lawful

<sup>1</sup> Prescott v. Williams, 5 Met. 429, 39 Am. Dec. 688.

<sup>2</sup> Rea v. Minkler, 5 Lans. 196; Blake v. Everett, 1 Allen, 248; Wetherbee v. Bennett, 2 Allen, 428; Harlow v. Thomas, 15 Pick. 66; Leonard v. Adams, 119 Mass. 366; Mitchell v. Warner, 5 Conn. 497; Wilson v. Cochran, 48 Pa. St. 107, 86 Am. Dec. 574; Russ v. Steel, 40 Vt. 310; De Rochemont v. Boston & M. R. Co. 64 N. H. 500, 15 Atl. Rep. 131; Haynes v. Stevens, 11 N. H. 28; Prichard v. Atkinson, 3 N. H. 335.

<sup>3</sup> De Rochemont v. Boston & M. R. Co. 64 N. H. 500, 15 Atl. Rep. 131.

<sup>4</sup> Bruns v. Schreiber, 48 Minn. 366, 51 N. W. Rep. 120.

<sup>5</sup> Farrington v. Tourtelott, 39 Fed. Rep. 738; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290; Burk v. Hill, 48 Ind. 52, 17

Am. Rep. 731; Maris v. Iles (Ind.), 30 N. E. Rep. 152; Barlow v. McKinley, 24 Iowa, 69; Quick v. Taylor, 113 Ind. 540, 16 N. E. Rep. 588.

<sup>6</sup> Prichard v. Atkinson, 3 N. H. 335; Butler v. Gale, 27 Vt. 739; Kellogg v. Ingersoll, 2 Mass. 97; Haynes v. Young, 36 Me. 557; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Wadham v. Swan, 109 Ill. 46; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290. It is provided by statute in Illinois that "no covenant of warranty shall be considered as broken by the existence of a highway upon the land conveyed unless otherwise particularly specified in the deed." R. S. ch. 30, § 10. This statute does not include a private way which is an incumbrance within the meaning of an implied covenant against incumbrances. Schmissaur v. Penn, 47 Ill. App. 278.

owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them, but it cannot affect the question whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid."<sup>1</sup>

**882.** The vendee's knowledge of the existence of an incumbrance, such as a highway or other visible easement, does not take such incumbrance out of the operation of the covenant.<sup>2</sup> This is the general rule, to which exceptions are to be noted in several States.

In a few States a public highway, open and in use, is the only exception to the rule.<sup>3</sup>

A vendee is not estopped to claim the benefits of the covenants

<sup>1</sup> Kellogg v. Ingersoll, 2 Mass. 97. In Harrison v. Des Moines & F. D. R. Co. (Iowa) 58 N. W. Rep. 1081, the broad ground is taken that a highway is not an incumbrance. Granger, C. J., saying: "The fact seems demonstrable that the mere fact of a public highway is not an incumbrance to land. It is probably true that such highways might be made an incumbrance, but that is not the question with which we are to deal. To our minds, the known conditions, of which judicial notice is taken, lead to the conclusion that public highways are so far essential to the usual and ordinary use and occupancy of land, and so far constitute an inducement for the purchase of the same, that they are not incumbrances, so as to constitute a breach of the usual covenants of warranty." See, also, Jordan v. Eve, 31 Gratt. 1.

<sup>2</sup> Farrington v. Tourtelott, 39 Fed. Rep. 738; Barlow v. Delaney, 40 Fed. Rep. 97. Connecticut: Hubbard v. Norton, 10 Conn. 422. Georgia: Miller v. Desverges, 75 Ga. 407, disapproving Skinner v. Moye, 69 Ga. 476; Smith v. Eason, 46 Ga. 316. Illinois: Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290. Indiana: Quick v. Taylor, 113 Ind. 540, 16 N. E. Rep. 588; Watts v. Fletcher, 107 Ind. 391, 8

N. E. Rep. 111; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731. Iowa: McGowen v. Myers, 60 Iowa, 256, 14 N. W. Rep. 788; Van Wagner v. Van Nostrand, 19 Iowa, 422; Barlow v. McKinley, 24 Iowa, 69; Gerald v. Elley, 45 Iowa, 322. Kentucky: Butt v. Riffe, 78 Ky. 352. Maine: Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426; Haynes v. Young, 36 Me. 557; Herrick v. Moore, 19 Me. 313. Massachusetts: Ladd v. Noyes, 137 Mass. 151; Kellogg v. Ingersoll, 2 Mass. 97; Sprague v. Baker, 17 Mass. 586; Harlow v. Thomas, 15 Pick. 66; Parish v. Whitney, 3 Gray, 516. Missouri: Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426. Nebraska: Burr v. Lamaster, 30 Neb. 688, 46 N. W. Rep. 1015. New Hampshire: Foster v. Foster, 62 N. H. 532; Fletcher v. Chamberlin, 61 N. H. 438, 447; Prichard v. Atkinson, 3 N. H. 335. New York: Huyck v. Andrews, 113 N. Y. 81, 20 N. E. Rep. 581; Doctor v. Darling, 22 N. Y. Supp. 594. Ohio: Long v. Moler, 5 Ohio St. 271. Vermont: Clark v. Conroe, 38 Vt. 469; Butler v. Gale, 27 Vt. 739.

<sup>3</sup> Bennett v. Keehn, 67 Wis. 154, 29 N. W. Rep. 207, 30 N. W. Rep. 112; Hymes v. Estey, 116 N. Y. 501, 22 N. E. Rep. 1087; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. Rep. 581.

of warranty in his deed by reason of having required and obtained the opinion of counsel as to the title before completing the sale.<sup>1</sup>

**883.** Parol evidence is not admissible to show that a purchaser knew of the existence of an incumbrance or adverse right not referred to in the deed, and took the conveyance subject to it.<sup>2</sup> "Uncertain would be the titles of real estate, and useless the registration of deeds, if their contents and effects were to be determined by the testimony of witnesses."<sup>3</sup>

It is competent to covenant against known incumbrances. The purchaser might know of the existence of an incumbrance, and yet expect that the grantor would remove it. But, however this might be, to show by parol evidence that he knew of the existence of the incumbrance and bought subject to it, is inadmissible either to control the meaning of the covenant or to mitigate the damages for a breach of it.<sup>4</sup>

**884.** A distinction is made in some cases between incumbrances which affect the title and those that simply affect the physical condition of the land, as regards the effect of notice to the grantee of the incumbrance, or knowledge of it on his part. "Where incumbrances of the former class exist, the covenant referred to, under all authorities, is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title."<sup>5</sup> Such incumbrances are usually of a temporary character and capable of removal; the very object of the covenant is to protect the vendee against them; hence knowledge, actual or constructive, of their existence, is no answer to an action for breach of such covenant. Where, however, there is a servitude imposed upon the land, which is visible to the eye

<sup>1</sup> *Eaton v. Chesebrough*, 82 Mich. 214, 40 N. W. Rep. 365.

<sup>2</sup> *Townsend v. Weld*, 8 Mass. 146; *Harlow v. Thomas*, 15 Pick. 66; *Edwards v. Clark*, 83 Mich. 246, 47 N. W. Rep. 112; *Smith v. Lloyd*, 29 Mich. 382, 388; *Ballard v. Burrows* (Iowa), 50 N. W. Rep. 74; *Yancey v. Tatlock* (Iowa), 61 N. W. Rep. 997; *Flynn v. Mining Co.* 72 Iowa, 738, 32 N. W. Rep. 471; *McGowen v. Myers*, 60 Iowa, 256, 14 N. W. Rep. 788; *Billingham v. Bryan*, 10 Iowa, 317; *Specht*

*v. Spangenberg*, 70 Iowa, 488, 30 N. W. Rep. 875; *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Budd v. United Carriage Co.* 25 Oreg. 314, 35 Pac. Rep. 660; *Medler v. Hiatt*, 8 Ind. 171; *Snyder v. Lane*, 10 Ind. 424.

<sup>3</sup> *Harlow v. Thomas*, 15 Pick. 66, per *Morton, J.*

<sup>4</sup> *Harlow v. Thomas*, 15 Pick. 66.

<sup>5</sup> *Cathcart v. Bowman*, 5 Pa. St. 317; *Funk v. Vonsida*, 11 S. & R. 109, 14 Am. Dec. 617.

and which affects not the title, but the physical condition of the property, a different rule prevails."<sup>1</sup>

885. Accordingly a visible servitude not affecting the title, but only the physical condition of the property, is not within the covenant, according to these decisions.<sup>2</sup> Therefore a public highway in use upon the property conveyed, although admittedly an incumbrance and possibly an injury to the property, is presumed to have been known to the purchaser. He is presumed not only to have seen the highway, but to have purchased with reference to it, whether it is an injury to the land or a benefit. If it is in fact an injury to the land, it is presumed that this fact was taken into account in fixing the price, and that the purchaser has obtained all that he paid for. He is not, therefore, allowed to complain of the servitude as a breach of the grantor's covenant against incumbrances.<sup>3</sup>

A purchaser of real estate, under a deed containing a covenant that the premises are free from incumbrances, given under a contract calling for a general warranty deed, cannot be heard to complain, in an action brought by him against the grantor to recover damages for an alleged breach of the covenant against incumbrances, that he did not get the easements that he expected to, because of the existence, in front of the premises, of an elevated railroad, in case the plaintiff knew, at the time of making his contract and taking his deed, that the easement was in the actual use and occupation of the railroad company, and thus had notice that the railroad company had some claim of right to the easement, and that it was partially extinguished.<sup>4</sup>

This rule does not apply in case of a highway which is not

<sup>1</sup> *Memmert v. McKeen*, 112 Pa. St. 315, 320, 4 Atl. Rep. 542. And see *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85. *Hun*, 533, 26 N. Y. Supp. 842; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Huyck v. Andrews*, 113 N. Y. 85, 20 N. E. Rep. 581; *Deverges v. Willis*, 56 Ga. 515, 21 Am. Rep. 289; *Jordan v. Eve*, 31 Gratt. 1; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. Rep. 653; *Lallande v. Wentz*, 18 La. Ann. 289; *Barre v. Fleming*, 29 W. Va. 314, 326, 1 S. E. Rep. 731; *Patton v. Quarrier*, 18 W. Va. 447.

<sup>2</sup> *Memmert v. McKeen*, 112 Pa. St. 315, 315, 4 Atl. Rep. 542.

<sup>3</sup> *Memmert v. McKeen*, 112 Pa. St. 315, 4 Atl. Rep. 542; *Patterson v. Arthurs*, 9 Watts, 152; *Wilson v. Cochran*, 46 Pa. St. 229; *Harrison v. Des Moines & Ft. D. R. Co. (Iowa)* 58 N. W. Rep. 1081; *Hymes v. Estey*, 116 N. Y. 501, 22 N. E. Rep. 1067, 133 N. Y. 342, 31 N. E. Rep. 105, 36 Hun, 147; *Bacharach v. Von Eiff*, 74

<sup>4</sup> *Bacharach v. Von Eiff*, 74 Hun, 533, 26 N. Y. Supp. 842.

open, visible, and in actual use at the time of the conveyance. If there is nothing upon the land to indicate the existence of a public highway over any part of it, and it is afterwards adjudged that some part of it has been dedicated as a street, and the grantee is enjoined from interfering with the use of such part as a street, there is a breach of the covenant of quiet enjoyment.<sup>1</sup>

886. The distinction between incumbrances which affect the physical condition of the property and those that affect the title is not, however, generally recognized. The authorities sustaining this distinction are criticised in a recent decision of the Court of Appeals of New York. "We do not yield assent to these authorities," say the court. "They have no sanction in any of the cases decided in this State, and have no adequate foundation in principle or reason. They open to litigation, upon parol evidence, in every action for the breach of the covenant against incumbrances caused by the existence of an easement, the question whether the grantee knew of its existence; and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest, or dominion over the land, and that he may rely upon them for his security. If open, visible, and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them, and the burden should not be cast upon the grantee to show that he was not aware of them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title, or incumbrances upon the land; but it should be incumbent upon the grantor, if he does not intend to covenant against such defects and incumbrances, to except them from the operation of his covenants. The distinction which is attempted to be made, between incumbrances which affect the title and those which affect merely the physical condition of the land conveyed, is quite illusory and unsatisfactory."<sup>2</sup>

887. If there is anything in the deed to show that the par-

<sup>1</sup> *Hymes v. Esty*, 116 N. Y. 501, 22 N. E. Rep. 1087.

<sup>2</sup> *Huyck v. Andrews*, 113 N. Y. 81, 90, 20 N. E. Rep. 581, per Earl, J.

ties did not intend that a known incumbrance should be within the covenant, the purchaser takes it *cum onere*, and cannot complain that the incumbrance is a breach of the covenant. But his mere knowledge of the incumbrance is not sufficient to exclude it from the operation of the covenant. The intention to exclude the incumbrance should be manifested in some way by the deed itself, for a resort to oral or other extraneous evidence would violate a settled principle of law in regard to deeds. A slight reference in the deed, or even a single word, may indicate that the property conveyed is subject to some right or easement to which it was not intended the covenant against incumbrances should apply.

Thus a highway described in the deed itself as a boundary of the land, or as crossing the land, is not within the covenants of the deed. In such case, knowledge of the fact of the existence of a public right of way upon the land is brought home to the purchaser by the deed itself, without a resort to oral or other extraneous evidence; and the rule that such evidence is not admissible to control the covenants is not violated.<sup>1</sup>

**888. The covenants of a deed are limited by the peculiar nature of the property described.** Thus, where a deed described the land as "flats," this term alone was held to imply that the public had a right to use the land for the purposes of navigation, and the existence of this public easement was declared not to be a breach of the covenant.<sup>2</sup>

The same rule applies in regard to an easement of the public in that portion of the land between high and low water mark on a navigable stream; and a covenant of warranty of such land is not broken by the existence of such an easement, because the grantee is presumed to have known of its existence, and to have contracted with reference to it.<sup>3</sup>

The covenant is limited in its effect to the particular incumbrance described. Under a covenant in a quitclaim deed by an heir to save the grantee harmless from liens arising out of claims against the estate of his ancestor, the grantee cannot recover for

<sup>1</sup> *Holmes v. Danforth*, 83 Me. 139, 21 Atl. Rep. 845. *Walton, J.*, refers to the case of *Mewmert v. McKeen*, 112 Pa. St. 315, 4 Atl. Rep. 542, where the fact of notice alone was held to be sufficient ground for excluding the operation of the

covenant against incumbrances, saying, "We do not go so far as that."

<sup>2</sup> *Montgomery v. Reed*, 69 Me. 510.

<sup>3</sup> *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. Rep. 731.

a breach of such covenant on the ground that, at the time of the execution of the deed, a right of way across the farm was vested in another.<sup>1</sup>

889. A covenant is extinguished by a reconveyance by the grantee to his grantor with like covenants as those in the deed to the grantee; as, for instance, where the same incumbrance of record existed at the time of each conveyance, and each contained a covenant against incumbrances, to avoid circuitry of action, the covenant in the one deed will be held to cancel the covenant in the other, so that no action on the covenant can be maintained by either party, or by the assignees of either.<sup>2</sup>

A special covenant to release the granted premises from an incumbrance named by the holder of the equitable title is not impaired by the attestation clause which recites that such covenantor "joins to release any equitable interest in said premises;" for this is not declared to be the only purpose of the covenantor in joining in the deed.<sup>3</sup>

890. A covenant against incumbrances is broken on the delivery of the deed, if an incumbrance on the land then exists. Accordingly an eviction is not necessary to the right of action on this covenant. There is a distinction in this respect between a covenant against incumbrances and a covenant of warranty against incumbrances.<sup>4</sup> When the covenant is in the usual form, "that the premises are free of all incumbrance," it is a covenant *in præsenti*, and is broken as soon as made. When, however, instead of standing by itself it is coupled to the covenant for quiet enjoyment, immediately following it and connected with it by the word *and*, it may be a covenant *in futuro*, and will then run with the land until broken.<sup>5</sup>

891. The right of action accrues to the covenantee immediately. When, at the time of the conveyance, there is an outstanding lien or incumbrance, the grantee need not wait until he is evicted. If the grantee extinguishes the incumbrance he may recover the amount so paid. If he has not extinguished it he can recover only nominal damages.<sup>6</sup>

<sup>1</sup> *Marsh v. Fish*, 66 Vt. 213, 28 Atl. Rep. 987.

<sup>2</sup> *Silverman v. Loomis*, 104 Ill. 137; *Brown v. Metz*, 33 Ill. 339; *Goodell v. Bennett*, 22 Wis. 565.

<sup>3</sup> *Palmer v. Wall*, 128 Mass. 475.

<sup>4</sup> *Fisk v. Cathcart*, 3 Colo. App. 374, 33 Pac. Rep. 1004; *Streeper v. Abela*,

59 Mo. App. 485; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. Rep. 909.

<sup>5</sup> *Rawle on Covenants*, §§ 70-73.

<sup>6</sup> *Bradshaw v. Crosby*, 151 Mass. 237,

V. *Covenant for Warranty and Quiet Enjoyment.*

892. A general covenant of warranty is tantamount to the covenant of quiet enjoyment, and what amounts to a breach of the one is a breach of the other.<sup>1</sup> The covenant of warranty is generally regarded as being no broader in its scope than the covenant for quiet enjoyment.<sup>2</sup>

In a few States, however, the covenant of warranty, in accordance with long-settled usage, is considered as equivalent to the several covenants in use under the common law; "as that one is seised of the land sold, that he has good and perfect right to convey, that the land is free from incumbrances, that the grantee shall quietly enjoy possession, and that the grantor will warrant and defend the title against all claims of all persons."<sup>3</sup>

The covenant of non-claim sometimes used is the same in effect as a qualified covenant of warranty.<sup>4</sup> It is broken in the same way, the damages for a breach are the same, and it equally runs with the land.

893. The covenant for quiet enjoyment is intended to secure undisturbed possession for the purchaser.<sup>5</sup> It protects the purchaser from a wrongful disturbance by the covenantor, his heirs or executors, or other person specially named in the covenant; but not a wrongful disturbance by any other person, for the law gives a direct remedy upon such a disturbance.<sup>6</sup>

24 N. E. Rep. 47; *Harwood v. Lee*, 85 Iowa, 622, 52 N. W. Rep. 521; *Funk v. Creswell*, 5 Iowa, 62; *Knadler v. Sharp*, 36 Iowa, 232; *Eversole v. Early*, 80 Iowa, 604, 44 N. W. Rep. 897.

<sup>1</sup> *Cheney v. Straube*, 35 Neb. 521, 53 N. W. Rep. 479; *Real v. Hollister*, 20 Neb. 112, 29 N. W. Rep. 189; *Meservey v. Snell* (Iowa), 62 N. W. Rep. 767; *Burk v. Burk*, 64 Ga. 632; *Butt v. Riffe*, 78 Ky. 352, 355.

<sup>2</sup> *Reed v. Hatch*, 55 N. H. 327, 336; *Peck v. Houghtaling*, 35 Mich. 127, 131; *Bostwick v. Williams*, 36 Ill. 65, 69; *Rea v. Minkler*, 5 Lans. 196; *Greenvault v. Davis*, 4 Hill, 643; *Clarke v. M'Annulty*, 3 Serg. & R. 364; *Emerson v. Proprietors*, 1 Mass. 464, per Sedgwick, J.

<sup>3</sup> *Smith v. Jones* (Ky.), 31 S. W. Rep. 475, 476, per Grace, J.; *Butt v. Riffe*, 78

Ky. 352; *Pryse v. McGuire*, 81 Ky. 608; *Lessly v. Bowie*, 27 S. C. 193, 3 S. E. Rep. 199; *Jeter v. Glenn*, 9 Rich. 374; *Evans v. McLucas*, 12 S. C. 56; *Welsh v. Kibler*, 5 S. C. 405; *Funk v. Creswell*, 5 Iowa, 62, 93.

<sup>4</sup> *Gibbs v. Thayer*, 6 Cush. 30; *Porter v. Sullivan*, 7 Gray, 441; *Trull v. Eastman*, 3 Met. 121; *Lothrop v. Snell*, 11 Cush. 453; *Newcomb v. Presbrey*, 8 Met. 406; *Kimball v. Blaisdell*, 5 N. H. 533; *Holbrook v. Debo*, 99 Ill. 372; *Bostwick v. Williams*, 36 Ill. 65, 70; *Gee v. Moore*, 14 Cal. 472.

See, however, as regards estoppel, *Partridge v. Patten*, 33 Me. 483; *Pike v. Galvin*, 29 Me. 183.

<sup>5</sup> *Ludwell v. Newman*, 6 T. R. 458.

<sup>6</sup> *Foster v. Mapes*, Cro. Eliz. 212; *Dudley v. Folliott*, 3 T. R. 584; *Nash*



Even as against the covenantor, the covenant extends only to any disturbance made by him under a claim of title, and not to anything done by way of trespass merely.<sup>1</sup>

Neither the covenant for quiet enjoyment nor that of warranty protects the grantee against adverse claims or suits for which the grantor is not responsible, but only against claims and suits based upon a legal foundation.<sup>2</sup>

A covenant which recites that the grantor covenants, grants, and agrees that he, "against all and every person and persons whomsoever lawfully claiming or to claim the same, or any part thereof, shall and will warrant and forever defend," is a covenant for quiet enjoyment, and not one against incumbrances.<sup>3</sup>

"A covenant that the party of the first part, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said party of the first part, his heirs and assigns, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend," is a warranty of peaceable possession, and is broken by an eviction under a paramount title.<sup>4</sup>

**894. The covenant of warranty applies to the estate conveyed, and cannot enlarge that estate.<sup>5</sup> If the deed conveys**

*v. Palmer*, 5 *Mau. & Sel.* 374; *Fowle v. Masson*, 67 *Cal.* 169, 7 *Pac. Rep.* 452; *Welsh*, 1 *B. & C.* 29; *Jeffries v. Evans*, 19 *C. B. N. S.* 246; *Sanderson v. Berwick-upon-Tweed*, 13 *Q. B. D.* 547; *Andrus v. St. Louis Smelting Co.* 130 *U. S.* 643, 9 *Sup. Ct. Rep.* 645; *Norton v. Schmucker (Tex.)*, 18 *S. W. Rep.* 720.

<sup>1</sup> *Penn v. Glover*, *Cro. Eliz.* 421; *Lloyd v. Tomkies*, 1 *T. R.* 671; *Seddon v. Senate*, 13 *East*, 63; *Sherman v. Williams*, 113 *Mass.* 481; *O'Keefe v. Kennedy*, 3 *Cush.* 325; *Sedgwick v. Hollenbeck*, 7 *Johns.* 376; *Curtis v. Deering*, 12 *Me.* 499; *Avery v. Dougherty*, 102 *Ind.* 443; *Wade v. Comstock*, 11 *Ohio St.* 71.

<sup>2</sup> *Hayes v. Bickerstaff*, *Vaughan*, 118; *Noonan v. Lee*, 2 *Black*, 499; *Kimball v. Grand Lodge*, 131 *Mass.* 59; *Bartlett v. Farrington*, 120 *Mass.* 284; *Akerly v. Vilas*, 23 *Wis.* 207, 99 *Am. Dec.* 165; *Gleason v. Smith*, 41 *Vt.* 293; *Underwood v. Birchard*, 47 *Vt.* 305; *Meservey v. Snell (Iowa)*, 62 *N. W. Rep.* 767; *West*

*Playter v. Cunningham*, 21 *Cal.* 229; *Branger v. Manciet*, 30 *Cal.* 624; *Kelly v. Dutch Church*, 2 *Hill*, 105; *Greenby v. Wilcocks*, 2 *Johns.* 1; *Moore v. Weber*, 71 *Pa. St.* 429; *Schuylkill R. Co. v. Schmoels*, 57 *Pa. St.* 273.

<sup>3</sup> *Leddy v. Enos*, 6 *Wash.* 247, 33 *Pac. Rep.* 508.

<sup>4</sup> *McLean v. Webster*, 45 *Kans.* 644, 26 *Pac. Rep.* 10.

<sup>5</sup> *Sweet v. Brown*, 12 *Metc.* 175, 45 *Am. Dec.* 243; *Allen v. Holton*, 20 *Pick.* 458; *Ballard v. Child*, 46 *Me.* 152; *McNear v. McComber*, 18 *Iowa*, 12; *Kimball v. Semple*, 25 *Cal.* 440; *Blanchard v. Brooks*, 12 *Pick.* 47; *White v. Brocaw*, 14 *Ohio St.* 339; *Adams v. Ross*, 30 *N. J. L.* 505, 510, 82 *Am. Dec.* 237; *Lamb v. Wakefield*, 1 *Sawyer*, 251; *Hope v. Stone*, 10 *Minn.* 141; *Hull v. Hull*, 35 *W. Va.* 155, 13 *S. E. Rep.* 49.

COVENANT FOR WARRANTY AND QUIET ENJOYMENT. [§§ 895, 896.]

merely the grantor's interest in the land, a covenant of general warranty in it is limited and restricted to such interest, and does not warrant the land against a superior title in another.<sup>1</sup>

It is limited as well to the particular parcel of ground intended to be conveyed according to the description in the deed.<sup>2</sup>

This covenant does not estop the grantor from claiming a breach of explicit conditions, incorporated in the granting part of the deed, restricting the future use of the granted property. "That which the covenantor in such a deed undertakes to warrant and defend against all lawful claims is not the land, or an absolute and unqualified estate in it, but 'the premises;' that is, the defeasible estate conveyed by the preceding grant, upon conditions expressed in the same deed."<sup>3</sup>

895. A covenant of warranty is not qualified by a phrase at the end of the description of the land, "being the same premises by a person named conveyed to me," even if through that deed an incumbrance was discoverable. The reference was designed to help identify the premises conveyed, and not to determine the quantity or quality of title. If the rule were otherwise it would be hazardous to accept deeds containing such references. Grantees would be too easily deceived by them.<sup>4</sup>

The force and effect of a formal and complete covenant of warranty will not be cut down by words of doubtful import in the deed,<sup>5</sup> nor by a written contract, contemporaneous with the deed, whereby it is agreed that the general covenant of warranty shall apply only to conveyances, incumbrances, and acts done or suffered by the grantor.<sup>6</sup>

896. A conveyance in terms of the grantor's right, title, and interest is not enlarged in scope by a general covenant, but such covenant must be limited to fit the estate and interest of the grantor.<sup>7</sup>

<sup>1</sup> *Hull v. Hull*, 35 W. Va. 155, 13 S. E. Rep. 49.

<sup>2</sup> *Allen v. Kersey*, 104 Ind. 1, 3 N. E. Rep. 557.

<sup>3</sup> *Linton v. Allen*, 154 Mass. 432, 438, 28 N. E. Rep. 780, per Barker, J.

<sup>4</sup> *Shaw v. Bisbee*, 83 Me. 400, 22 Atl. Rep. 361, per Peters, C. J.; *Hathorn v. Hinds*, 69 Me. 326.

<sup>5</sup> *Cornish v. Capron*, 136 N. Y. 232, 32 N. E. Rep. 773.

<sup>6</sup> *Rinehart v. Rinehart*, 91 Ind. 89.

<sup>7</sup> *Hanrick v. Patrick*, 119 U. S. 156, 175, 7 Sup. Ct. Rep. 147; *Allen v. Holton*, 20 Pick. 458; *Sweet v. Brown*, 12 Metc. 175, 45 Am. Dec. 243; *Blanchard v. Brooks*, 12 Pick. 47; *McNear v. McComber*, 18 Iowa, 12; *Gee v. Moore*, 14 Cal. 472; *Kimball v. Semple*, 25 Cal. 440; *Bates v. Foster*, 59 Me. 157, 8 Am. Rep. 406; *Gibson v. Chouteau*, 39 Mo. 536; *Young v. Clippinger*, 14 Kans. 148; *Stockwell v. Coulinger*, 14 Kans. 148; *Stockwell v. Coulinger*, 14 Kans. 148; *Stockwell v. Coulinger*, 14 Kans. 148.

Even if the grant is of certain land described, with an explanation that the grantor means to convey only his right, title, and interest in it, a general warranty of title is restricted to the grantor's interest.<sup>1</sup>

But if it is evident from the deed itself that the grantor intended to convey an estate of a particular description or quality, the grantor is bound by his covenants, at least to the extent of being estopped to say that he was not seised of such estate at the time of the conveyance.<sup>2</sup>

**897. Covenants of warranty do not cover a title or incumbrance held by the covenantee himself.** They extend only to a title or incumbrance existing in a third person which may defeat the estate granted by the covenantor.<sup>3</sup> The grantee cannot set up, as a breach of the covenant of his deed, an outstanding title in himself, or an incumbrance held by him. "It never can be permitted to a person to accept a deed with covenants of seisin, and then turn round upon his grantor and allege that his covenant is broken, for that, at the time he accepted the deed, he himself was seised of the premises."<sup>4</sup>

**898. The covenant of warranty is not a warranty of quantity in a deed which describes the land by metes and bounds, and as containing a certain number of acres, "more or less," though in fact the quantity is greatly less than it is represented to be in such description.<sup>5</sup>** The description of quantity is a part of the

lard, 129 Mass. 231; Reynolds v. Shaver, 59 Ark. 299, 27 S. W. Rep. 78; McDonough v. Martin, 88 Ga. 675, 16 S. E. Rep. 59, per Blickley, C. J.; Cummings v. Dearborn, 56 Vt. 441; Bowen v. Thrall, 28 Vt. 382; Marsh v. Fish, 66 Vt. 213, 28 Atl. Rep. 987; Habig v. Dodge, 127 Ind. 31, 40, 25 N. E. Rep. 182; Locke v. White, 89 Ind. 492; Bryan v. Uland, 101 Ind. 477. The statutory covenant will be restrained where the conveyance is of the grantor's interest only. Gibson v. Chouteau, 39 Mo. 536; Koenig v. Branson, 73 Mo. 634.

<sup>1</sup> Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406.

*Contra*, McNear v. McComber, 18 Iowa, 12.

<sup>2</sup> Habig v. Dodge, 127 Ind. 31, 25 N. E. Rep. 182; Nicholson v. Caress, 45 Ind.

479, 485; Hannon v. Christopher, 34 N. J. Eq. 459.

<sup>3</sup> Smiley v. Fries, 104 Ill. 416; Furness v. Williams, 11 Ill. 229; Beebe v. Swartwout, 8 Ill. 162; Carson v. Cabeen, 45 Ill. App. 262; Horrigan v. Rice, 39 Minn. 49, 38 N. W. Rep. 765.

<sup>4</sup> Fitch v. Baldwin, 17 Johns. 161, 166.

<sup>5</sup> Rogers v. Peebles, 72 Ala. 529; Winston v. Browning, 61 Ala. 80; Carter v. Beck, 40 Ala. 599; Wright v. Wright, 34 Ala. 194; Erskine v. Wilson, 41 S. C. 198, 19 S. E. Rep. 489; Commissioner v. Thompson, 4 McCord, 434; Banskett v. Jones, 2 Speer, 68; Douthit v. Hipp, 23 S. C. 205; Pickman v. Trinity Church, 123 Mass. 1; Powell v. Clark, 5 Mass. 355.

But relief in equity may be had by the

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general description of the land, and not a special warranty of quantity.

A covenant of title is only applicable to the lands conveyed.<sup>1</sup> The grantee cannot recover upon his warranty on the ground that he supposed certain land was included in the description, when in fact it was not.<sup>2</sup>

899. When by mistake the deed describes land other than that intended, it should be reformed before any action is had upon the covenants.<sup>3</sup> The grantee's cause of action to reform the deed is personal to him, and not a covenant running with the land, and will not therefore, without apt words of assignment, pass to a purchaser from the grantee under a deed which describes the same land described in the deed to his grantor.<sup>4</sup>

900. A covenant that, in case of a deficiency in quantity, the grantor will convey sufficient additional land adjoining the granted land to make up the required quantity on demand of the purchaser within a time named, is restricted to land owned by the grantor, and the provision that the purchaser shall make demand within the time limited is an express condition precedent to an action upon the covenant.<sup>5</sup>

901. A parol warranty, or a parol promise by the grantor to warrant and defend his title to the grantee, is within the statute of frauds, and therefore void.<sup>6</sup> Such an undertaking is an interest in land within the meaning of the statute. Under the old common law a warranty meant an undertaking by the feoffor or donor of land to defend the feoffee or donee in possession, and to give land of equal value in case the latter should be evicted. Under the later common law, an action of covenant was allowed for the breach of a promise in writing under seal. This

purchaser for a material deficiency in quantity where he was influenced to pay the price upon the grantor's misrepresentation of the quantity. *Sine v. Fox*, 33 W. Va. 521, 11 S. E. Rep. 218; *Kelly v. Riley*, 22 W. Va. 247.

<sup>1</sup> *Hall v. Scott Co.* 2 McCrary, 356.

<sup>2</sup> *McCreary v. Douglass*, 5 Tex. Civ. App. 492, 24 S. W. Rep. 367.

<sup>3</sup> *Axtel v. Chase*, 83 Ind. 546.

<sup>4</sup> *Norris v. Colorado Turkey Honestone Co. (Colo.)* 43 Pac. Rep. 1024, citing *Collins v. Suan*, 7 Rob. (N. Y.) 623; *Wil-*

*loughby v. Middlesex Co.* 8 Met. 296; *Lawrence v. Montgomery*, 37 Cal. 183; *Davis v. Clark*, 33 N. J. Eq. 579; *Chambliss v. Miller*, 15 La. Ann. 713.

<sup>5</sup> *Winnepiseogee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. Rep. 171.

<sup>6</sup> *Raymond v. Raymond*, 10 Cush. 134; *Walterhouse v. Garrard*, 70 Ind. 400; *McDonald v. Elfes*, 61 Ind. 279; *Kelly v. Palmer (Neb.)*, 60 N. W. Rep. 924; *Bishop v. Little*, 5 Me. 362. And see *Buckner v. Street*, 15 Fed. Rep. 365; *Kerr v. Shaw*, 13 Johns. 236.

proposition seems to have been questioned only in the early cases in Pennsylvania, before the fourth section of the statute of frauds had been enacted.<sup>1</sup>

**902.** According to the decisions in a few States, however, a parol warranty of the quality of land is not merged in an ordinary warranty deed of it, but the grantor is liable to the purchaser for a breach of such parol warranty.<sup>2</sup> While it is admitted that a bill of sale of personal property cannot be varied by a prior or contemporaneous parol warranty, because the writing is supposed to contain all of the contract between the parties, this rule is said not to apply to an ordinary conveyance of real property, for the deed is regarded as the mere transfer of the title or delivery of the land. "The deed is evidence of the final consummation of some contract previously made, but is not evidence of the contract."<sup>3</sup>

**903.** The covenant of warranty or for quiet enjoyment is broken only by an eviction under a paramount title.<sup>4</sup> It is not broken by the mere claim or existence of a title paramount in another, so long as this is not asserted.<sup>5</sup>

To constitute a breach of these covenants, the grantee must show an actual disturbance of his possession by the grantor, his

<sup>1</sup> *Bell v. Andrews*, 4 Dall. 152; *George v. Barton*, 7 Watts, 530.

<sup>2</sup> *Saville v. Chalmers*, 76 Iowa, 325, 41 N. W. Rep. 30; *Green v. Batson*, 71 Wis. 54, 36 N. W. Rep. 849.

<sup>3</sup> *Thayer v. Reeder*, 45 Iowa, 272, quoted and approved in *Saville v. Chambers*, 76 Iowa, 325, 41 N. W. Rep. 30.

<sup>4</sup> *Peters v. Bowman*, 98 U. S. 56. **Illinois**: *Smith v. Newton*, 38 Ill. 230; *Weaver v. Wilson*, 48 Ill. 125; *Barry v. Guild*, 126 Ill. 439, 18 N. E. Rep. 759, 28 Ill. App. 39. **Kentucky**: *Pryse v. McGuire*, 81 Ky. 608. **Maine**: *Montgomery v. Reed*, 69 Me. 510. **Massachusetts**: *Kramer v. Carter*, 136 Mass. 504, 507; *Funas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *White v. Whitney*, 3 Met. 81; *Tufts v. Adams*, 8 Pick. 547; *Sprague v. Baker*, 17 Mass. 586. **Michigan**: *Matteson v. Vaughn*, 38 Mich. 373. **Mississippi**: *Watkins v. Gregory*, 69 Miss. 469, 13 So. Rep. 696. **Missouri**: *Barlow v. Delaney*, 40 Fed. Rep. 97, 86 Mo. 583; *White v.*

*Stevens*, 13 Mo. App. 240. **Nebraska**: *Cheney v. Straube*, 35 Neb. 521, 53 N. W. Rep. 479; *Latham v. McCann*, 2 Neb. 276. **New Jersey**: *Stewart v. Drake*, 9 N. J. L. 139. **New York**: *Boreel v. Lawton*, 90 N. Y. 293; *Mead v. Stackpole*, 40 Hun, 473; *Kidder v. Bork*, 12 Misc. 519, 33 N. Y. Supp. 663. **Ohio**: *Smith v. Dixon*, 27 Ohio St. 471. **Tennessee**: *Hayes v. Ferguson*, 15 Lea, 1, 54 Am. Rep. 398. **Vermont**: *Clement v. Bank*, 61 Vt. 298, 17 Atl. Rep. 717.

<sup>5</sup> *Allis v. Nininger*, 25 Minn. 525; *Clafin v. Case*, 53 Kans. 560, 36 Pac. Rep. 1062; *Washington Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. Rep. 193; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. Rep. 909; *Jones v. Richmond*, 88 Va. 231, 13 S. E. Rep. 414; *Dickinson v. Hoopes*, 8 Gratt. 353, 396; *Yancey v. Lewis*, 4 Hen. & M. 390; *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. Rep. 68; *Rex v. Creel*, 22 W. Va. 373.

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heirs or assigns, or a necessary yielding to a paramount title; or, in other words, either an actual or constructive eviction.<sup>1</sup>

904. These covenants are broken by the very commencement of an action on the better title. Any entry and dispossession adversely and lawfully made under paramount title will be an eviction; and whenever such a right is exercised, it is considered to have all the force and effect of a dispossession under legal process.<sup>2</sup>

To establish a *prima facie* breach of the covenant, the grantee is required merely to prove that he has either been evicted or kept out of possession by one in actual possession claiming title paramount to his own. The presumption of title which then arises in favor of the party in possession must be overcome by proving title out of him, or both the aforesaid breaches may be deemed established by sufficient proof.<sup>3</sup>

905. The eviction must be from the whole or some part of the premises by title paramount.<sup>4</sup> The covenantee cannot recover as for an eviction from the whole of certain lands, on proof that one claiming under a paramount title had recovered in ejectment an undivided half interest therein, as such recovery is not a constructive recovery of the other half interest. The covenant in such case is broken only as to such undivided half, and the covenantee would be in possession jointly with another as tenant in common with him.<sup>5</sup>

The removal of a building from the granted land by a tenant under a prior agreement with the grantor is a breach of the covenant of warranty.<sup>6</sup>

906. An incumbrance does not constitute a breach of this covenant until the grantee's possession is disturbed. Out-

<sup>1</sup> Whitbeck v. Cook, 15 Johns. 483, 8 Am. Dec. 272; Sedgwick v. Hollenback, 7 Johns. 376; Carter v. Denman, 23 N. J. L. 260; Kellog v. Platt, 33 N. J. L. 328; Zabriskie v. Baudendistel (N. J. Eq.), 20 Atl. Rep. 163; Baudendistel v. Zabriskie, 50 N. J. Eq. 453; Real v. Hollister, 20 Neb. 112, 29 N. W. Rep. 189; Anderson v. Buchanan, 20 Neb. 272, 29 N. W. Rep. 935; Morgan v. Henderson, 2 Wash. T. 367, 8 Pac. Rep. 491; Moore v. Frank- enfeld, 25 Minn. 540.

<sup>2</sup> Stewart v. West, 14 Pa. St. 336, per Gibson, C. J.

<sup>3</sup> Heyn v. Ohman, 42 Neb. 693, 60 N. W. Rep. 952.

<sup>4</sup> Cecconi v. Rodden, 147 Mass. 164, 16 N. E. Rep. 749; Kramer v. Carter, 136 Mass. 504; Mooney v. Burchard, 84 Ind. 285.

<sup>5</sup> McGrew v. Harmon, 164 Pa. St. 115, 30 Atl. Rep. 265; Dewey v. Brown, 2 Pick. 387; Gray v. Givens, 26 Mo. 291; Dawson v. Mills, 32 Pa. St. 302.

<sup>6</sup> West v. Stewart, 7 Pa. St. 122.

standing city and county taxes at the time the deed was executed do not constitute a breach of the covenant against quiet enjoyment. The payment of such taxes by the grantee, before any move is made to collect the same, is a voluntary payment, and imposes no liability upon the grantor under the covenant.<sup>1</sup>

A mortgage upon the property is not a breach of the covenant for quiet enjoyment, but the covenant is broken when the mortgage is foreclosed and the property sold.<sup>2</sup> "If one is content to take a deed with a covenant for quiet enjoyment only, he can have no relief until his possession is disturbed by one claiming under a superior title. He could have no relief whatever by reason of the fact that there was a mortgage upon the property at the time the deed was made, until the rights under the mortgage had been so asserted as to interfere with his possession; whereas, if the deed had contained a covenant against incumbrances, a right of action would have accrued upon the delivery of the deed, if at the time there was an outstanding mortgage upon the property."<sup>3</sup>

Thus, if there is a paramount mortgage upon the land, there is no breach of the covenant of warranty until the mortgagee or the purchaser at the mortgage sale has taken possession;<sup>4</sup> though a voluntary payment of the mortgage when foreclosure is threatened is a breach of the covenant, the grantee in such case assuming the burden of showing that the mortgage was a paramount title.<sup>5</sup> The recording of a certificate of entry by a mortgagee for the purpose of foreclosure is a breach of the covenant.<sup>6</sup>

907. The covenant of warranty can never be treated as a covenant against incumbrances, for in that case, the incumbrances being in existence when the deed was made, the covenant would be broken at the time of the conveyance, and would become a mere right of action not assignable at law, and would not pass to the subsequent grantee.<sup>7</sup>

<sup>1</sup> *Leddy v. Enos*, 6 Wash. 247, 33 Pac. Rep. 508.

<sup>2</sup> *Cornish v. Capron*, 136 N. Y. 232, 32 N. E. Rep. 773; *St. John v. Palmer*, 5 Hill, 599; *Jackson v. McAuley* (Wash.), 43 Pac. Rep. 41; *McLean v. Webster*, 45 Kans. 644, 26 Pac. Rep. 10.

<sup>3</sup> *Jackson v. McAuley* (Wash.), 43 Pac. Rep. 41, per Hoyt, C. J.

<sup>4</sup> *Hamilton v. Lusk*, 88 Ga. 520, 15 S. E. Rep. 10; *Kramer v. Carter*, 136 Mass. 504.

<sup>5</sup> *Sprague v. Baker*, 17 Mass. 586.

<sup>6</sup> *Furnas v. Durgin*, 119 Mass. 500.

<sup>7</sup> *Marbury v. Thornton*, 82 Va. 702, 1

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908. The existence of an easement in the land conveyed is not a breach of these covenants until the right is asserted or used. It was so held even where the easement was a right of way in favor of a railroad company for its road, for the right of way might by non-user revert to the grantor.<sup>1</sup>

An outstanding equitable title which may ripen into a paramount title is within the general covenants of warranty.<sup>2</sup> But if the covenantee takes possession, or has power to take possession, under his deed, he cannot complain of the outstanding equitable title until it is successfully asserted.<sup>3</sup>

909. The loss of an incorporeal incident of the land conveyed, by virtue of a paramount right in another, may be a breach of the covenant of warranty and quiet enjoyment. Thus, where a mill with a dam and pond was conveyed with such covenants, but without any express covenant in regard to the water-power, and the purchaser, while maintaining the dam at the same height as it was when the conveyance was made, was sued for overflowing the land of another, and was compelled to reduce the height of the dam, it was held that there was a breach of the covenants. "The grantee, therefore, was not merely deprived of an easement in another's land which was not conveyed, and which his deed did not purport to convey, but he lost by force of the paramount title a thing actually conveyed, included within the metes and bounds of his deed, and just as much property granted by that conveyance as if it had been a particular acre of the land. Considering the subject-matter of the grant, the peculiar character of the property as a water-power and a mill-site, the existence of the dam at a height essential to that power and to the full enjoyment of the property, we hold that the deed conveyed the dam at its existing height, and the covenant of warranty was broken when the grantee was compelled, in whole or in part, to take it down."<sup>4</sup>

910. The covenants of warranty and for quiet enjoyment are broken if there is an outstanding title to an easement which

S. E. Rep. 909; *Washington City Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. Rep. 193; *Sheffey v. Gardiner*, 79 Va. 313; *Dickinson v. Hoopes*, 8 Gratt. 353; *Kramer v. Carter*, 136 Mass. 504.

<sup>1</sup> *Brown v. Young*, 69 Iowa, 625, 29 N. W. Rep. 941.

<sup>2</sup> *Dugger v. Oglesby*, 99 Ill. 405.

<sup>3</sup> *Wilson v. Irish*, 57 Iowa, 184, 6 N. W. Rep. 591, 10 N. W. Rep. 343.

<sup>4</sup> *Adams v. Conover*, 87 N. Y. 422, 428, 22 Hun, 424, 41 Am. Rep. 381, per Finch, J.

See, however, *Mitchell v. Warner*, 5



materially impairs the value of the property conveyed, and interferes with the use and possession of some portion of it, although there is no physical ouster.<sup>1</sup> It is broken in case the land is situated upon a stream, and the owner below, under and by virtue of a paramount right, raises the height of a dam upon his land, and thereby floods the purchaser's land; for the flooding of the land under such paramount right is an eviction. "Anciently, by the feudal constitution, if the vassal's title to the fee which he had received at the hands of his lord, and for which he was to render certain duties, failed, he had the right to call upon his lord in a proper form of action for other land of equal value. The modern personal covenants contained in deeds which are not more than two hundred years old are a substitute for this ancient right. Now, instead of other lands, the grantee recovers upon his covenants damages for the land from which he was ousted, or to which his title fails. Suppose some feudal lord had given to his vassal land which another person subsequently flooded under a paramount right, can it be doubted that the lord could have been compelled to give other land of equal value? And so now, instead of land, the grantor should, upon his covenant of warranty, be compelled to give damages."<sup>2</sup>

The loss of an easement apparently belonging to the land conveyed, but not belonging to the grantor, or necessarily attached to the land, is not a breach of the covenants of warranty and quiet enjoyment. Thus, where a dwelling-house and lot with appurtenances were conveyed with such covenants, and at the time of the conveyance the drain-pipes from the house emptied into a sewer leading from the premises to and across the adjoining land of another, who had given no continuing right to such use of the sewer, and who afterwards obtained a perpetual injunction against the purchaser's using the sewer, it was held that there was no breach of the covenants, as the use of the

Conn. 497; *Dobbins v. Brown*, 12 Pa. St. 75; *Peters v. Grubb*, 21 Pa. St. 455.

<sup>1</sup> *Scriven v. Smith*, 100 N. Y. 471, 3 N. E. Rep. 675, 53 Am. Rep. 224; *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381; *Rea v. Minkler*, 5 Lans. 196; *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Russ v. Steele*, 40 Vt. 310; *Clark v. Con-*

*roe*, 38 Vt. 469; *Butt v. Riffe*, 78 Ky. 352, relating to a private passageway.

<sup>2</sup> *Scriven v. Smith*, 100 N. Y. 471, 478, 3 N. E. Rep. 675, 53 Am. Rep. 224, 30 Hun, 129, per Earl, J. And see *Adams v. Conover*, 87 N. Y. 422; *Green v. Collins*, 86 N. Y. 246; *Rea v. Minkler*, 5 Lans. 196.

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sewer was not a legal appurtenance within the meaning of the deed.<sup>1</sup>

911. This covenant is broken in case the land described by metes and bounds encroaches upon a highway, and the purchaser is compelled to remove a house and fence which so encroached. "The street was obvious and observable, of course; but the hidden fact which afterwards transpired, that, according to the true measurements of the street, the house stood upon a part of the highway, was not observable and in no wise apparent, and could not have been in contemplation of the parties contracting together. The purchaser was disturbed in the quiet possession he had contracted for, and deprived of a part of his house altogether, and of exclusive possession of a part of the land he had purchased. We cannot but regard this as a breach of the covenants in his deed for quiet possession."<sup>2</sup>

The covenants of warranty and for quiet enjoyment are not broken by reason of a limitation of the use of land formerly a portion of a street, where this limitation is authorized by a statute, for a purchaser is presumed to know of such limitation of his right.<sup>3</sup>

912. A covenant of general warranty is not broken by an entry upon the land by authority of the State in the exercise of the right of eminent domain. Such entry is an inherent right in the State, and cannot be prevented by the owner; his remedy is compensation provided by the State, and not an action on his vendor's covenant of warranty.<sup>4</sup>

913. But when the title to the land in controversy is in the United States, and liable to entry and settlement under the provisions of the homestead law, that of itself is such a hostile assertion of the paramount title as would authorize the purchaser to voluntarily submit to it.<sup>5</sup> The reason given for this rule in some

<sup>1</sup> *Green v. Collins*, 86 N. Y. 246, 40 Am. Rep. 531, 20 Hun, 474.

<sup>2</sup> *Trice v. Kayton*, 84 Va. 217, 220, 4 S. E. Rep. 377, per Lacy, J.

<sup>3</sup> *Neeson v. Bray*, 19 N. Y. Supp. 841, 46 N. Y. St. Rep. 914.

<sup>4</sup> *Ake v. Mason*, 101 Pa. St. 17; *Dyer v. Wightman*, 66 Pa. St. 425; *Patterson v. Arthurs*, 9 Watts, 152; *Bailey v. Miltenberger*, 31 Pa. St. 37; *Dobbins v. Brown*, 12 Pa. St. 75; *Brimmer v. Boston*, 102

Mass. 19; *Cooper v. Bloodgood*, 32 N. J. Eq. 209; *Kuhn v. Freeman*, 15 Kans. 423; *Stevenson v. Loehr*, 57 Ill. 509; *Folts v. Huntley*, 7 Wend. 210.

<sup>5</sup> *Kansas Pac. Ry. Co. v. Dunmeyer*, 19 Kans. 539. As tending to support this rule, see *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Abbott v. Rowan*, 33 Ark. 593; *Green v. Irving*, 54 Miss. 450; *Glenn v. Thistle*, 23 Miss. 42; *Brown v. Allen*, 32 N. Y. St. 796, 10 N. Y. Supp.

decisions is that the statute of limitations does not run against the United States, and that no length of adverse holding will secure a title to the grantee in possession. In addition to this, the United States should be considered as always asserting title to its lands.<sup>1</sup> The lands belonging to the public domain of the United States, subject to entry and settlement, may be considered as always being offered for sale to those who possess the proper qualifications.

914. There may be a constructive eviction as well as an actual. A constructive eviction may be founded on the assertion of a hostile paramount title. If such a title is claimed, and exists in fact, there is a constructive eviction, though no judgment in favor of the claim has been rendered.<sup>2</sup> The inability of the purchaser to enter into possession of the land without committing a trespass, by reason of the paramount title being in another, has the same effect, as respects the right of action for a breach of the covenants contained in the deed, as would an eviction if possession had been acquired.<sup>3</sup>

915. There is a constructive eviction when the purchaser is unable to obtain possession by reason of a paramount title and possession in another.<sup>4</sup> The purchaser is not required to

714; McLennan v. Prentice, 85 Wis. 427, 55 N. W. Rep. 764; Yokum v. Thomas, 15 Iowa, 67; Meservey v. Snell (Iowa), 62 N. W. Rep. 767.

<sup>1</sup> Dillahunt v. Little Rock & Ft. S. Ry. Co. 59 Ark. 629, 27 S. W. Rep. 1002, 28 S. W. Rep. 657.

<sup>2</sup> Axtel v. Chase, 83 Ind. 546; Knepper v. Kurtz, 58 Pa. St. 480; Sprague v. Baker, 17 Mass. 585; Loomis v. Bedel, 11 N. H. 74; Green v. Irving, 54 Miss. 450, 28 Am. Rep. 360; St. John v. Palmer, 5 Hill, 599; Matteson v. Vaughn, 38 Mich. 375; Funk v. Creswell, 5 Iowa, 89; Mead v. Stackpole, 40 Hun, 473; Shattuck v. Lamb, 65 N. Y. 499, 505, 22 Am. Rep. 656; Parkinson v. Sherman, 74 N. Y. 88, 93, 30 Am. Rep. 268; Patton v. McFarlane, 3 Pen. & W. 419.

<sup>3</sup> Resser v. Carney, 52 Minn. 397, 54 N. W. Rep. 89; Fritz v. Pusey, 31 Minn. 368, 18 N. W. Rep. 94; Shattuck v. Lamb, 65 N. Y. 499, 22 Am. Rep. 656.

<sup>4</sup> Blanchard v. Blanchard, 48 Me. 174; Curtis v. Deering, 12 Me. 499; Hamilton

v. Cutts, 4 Mass. 349; Chandler v. Brown, 59 N. H. 370; Drew v. Towle, 30 N. H. 531; Green v. Irving, 54 Miss. 450; Witty v. Hightower, 12 Sm. & M. 478; Mills v. Rice, 3 Neb. 76; Playter v. Cunningham, 21 Cal. 229; Moore v. Vail, 17 Ill. 185; Shattuck v. Lamb, 65 N. Y. 499, 22 Am. Rep. 656; Fowler v. Poling, 6 Barb. 165. In the last-named case the authorities are carefully reviewed, and the early case of Kortz v. Carpenter, 5 Johns. 120, directly overruled. Green-vault v. Davis, 4 Hill, 643; Grist v. Hodges, 3 Dev. 198; Mackey v. Collins, 2 Nott. & M. 186; Marbury v. Thornton, 82 Va. 702, 1 S. E. Rep. 909; Jones v. Richmond, 88 Va. 231, 13 S. E. Rep. 414; Claffin v. Case, 53 Kans. 560, 36 Pac. Rep. 1062; Fritz v. Pusey, 31 Minn. 368, 18 N. W. Rep. 94; Murphy v. Price, 48 Mo. 247; Blondeau v. Sheridan, 81 Mo. 545; Russ v. Steele, 40 Vt. 310; Clark v. Conroe, 38 Vt. 469, 475; Rex v. Creel, 22 W. Va. 373.

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commit a trespass in his endeavor to make an actual entry. The covenant is broken when at the time of the conveyance the land is incumbered by a lease under which the lessee holds possession with the grantor's agreement to convey the land to him on the payment of a certain sum.<sup>1</sup>

When at the time of the conveyance a third person is in possession holding under a paramount title, the covenant of warranty is at once broken, and there is a constructive eviction.<sup>2</sup>

916. It is not necessary that the vendee should take actual possession of the land in order to have a good cause of action on the covenant of warranty. He is not required to hold possession himself, or by his tenants or agents. The fact that if a vendee who has been dispossessed had taken possession of the land at the time of the conveyance to him, he would have acquired title by adverse possession, does not relieve his vendor from liability to him on his warranty of title.<sup>3</sup>

917. There may be a constructive eviction where the grantee's possession is constructive only. In some early cases it seems to have been held that an actual putting out of possession was necessary to constitute a breach of the covenant.<sup>4</sup> Under this strict rule, there could be no eviction unless the grantee first obtained possession. It was accordingly declared that, as between the covenantor and covenantee, the former could not, to defeat his covenant, say that the latter was not in actual possession; and, being thus in, the actual adverse possession of a third person put him out *eo instanti*, and so constituted an eviction.<sup>5</sup> And so, where the land was vacant and the covenantee did not take possession in fact, it was held that, as the legal title had passed to him, the constructive possession vested in him, and he was constructively evicted when the legal title passed to a third person under a decree for the foreclosure and sale of the land under a prior mortgage.<sup>6</sup>

918. The possession of one holding adversely to the grantee is *prima facie* evidence of title in the adverse holder and of eviction of the grantee. In an action to recover damages for a

<sup>1</sup> Smith v. Scribner, 59 Vt. 96, 7 Atl. Rep. 711.

<sup>2</sup> Dillahunty v. Little Rock & Ft. S. Ry. Co. 59 Ark. 629, 28 S. W. Rep. 657.

<sup>3</sup> Graham v. Dyer (Ky.), 29 S. W. Rep. 346.

<sup>4</sup> Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Webb v. Alexander, 7 Wend. 281; Kerr v. Shaw, 13 Johns. 236.

<sup>5</sup> Grist v. Hodges, 3 Dev. N. C. 198.

<sup>6</sup> St. John v. Palmer, 5 Hill, 599; Moore v. Vail, 17 Ill. 185.

breach of covenants of warranty of title and for quiet enjoyment, the plaintiff, to establish *prima facie* the breaches alleged, is required merely to prove that he has either been evicted or kept out of possession by one in actual possession claiming title paramount to his own. The presumption of title which then arises in favor of the party in possession must be overcome by proving title out of him, or both of the breaches named may be deemed established by sufficient proof.<sup>1</sup> The covenantee is not required to commit a trespass to acquire possession.<sup>2</sup>

Where at the time of the conveyance the real estate is vacant and continues vacant, and the owner of the true title brings against the covenantee an action in the form of ejectment to determine the title, the covenantee may waive the objection that, by reason of his not being in possession, that form of action will not lie, and may try the title in the action thus brought, and, upon final judgment against him on the question of title, may abandon all further claim to the premises, and that will constitute a breach of the covenant.<sup>3</sup>

919. There is a constructive eviction also when the paramount title is so asserted that the grantee must yield to it or go out. The grantee in such case may purchase the title of the true owner, and this will be considered a sufficient eviction to constitute a breach.<sup>4</sup>

<sup>1</sup> Heyn v. Ohman, 42 Neb. 693, 60 N. W. Rep. 952. That possession is *prima facie* evidence of title, see Robinoe v. Doe, 6 Blackf. 85; Ward v. McIntosh, 12 O. St. 231; Shumway v. Phillips, 22 Pa. St. 151; Jones v. Bland, 112 Pa. St. 176, 2 Atl. Rep. 541; Brown v. Feagina, 37 Neb. 256.

<sup>2</sup> Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36; Anderson v. Knox, 20 Ala. 156; Thomas v. St. Paul's M. E. Church, 86 Ala. 138, 144, 5 So. Rep. 508; Sayre v. Sheffield Land Co. (Ala.) 18 So. Rep. 101.

<sup>3</sup> Allis v. Nininger, 25 Minn. 525.

<sup>4</sup> Barlow v. Delaney, 40 Fed. Rep. 97; Duvall v. Craig, 2 Wheat. 45; Noonan v. Lee, 2 Black, 499; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Sprague v. Baker, 17 Mass. 585; Smith v. Shepard, 15 Pick. 147, 25 Am. Dec. 432; Donnell v. Thompson, 10 Me. 170, 177, 25 Am. Dec. 216; Mitchell v. Warner, 5 Conn.

497, 522; Sterling v. Peet, 14 Conn. 245; McGary v. Hastings, 39 Cal. 367, 2 Am. Rep. 456; Loomis v. Bedel, 11 N. H. 74; Dillahunty v. Little Rock & Ft. S. Ry. Co. 59 Ark. 629, 27 S. W. Rep. 1002; Ogden v. Ball, 40 Minn. 94, 41 N. W. Rep. 453; Moore v. Vail, 17 Ill. 185; Axtel v. Chase, 83 Ind. 546; Kellogg v. Platt, 33 N. J. L. 328; Flynn v. White Breast Coal M. Co. 72 Iowa, 738, 32 N. W. Rep. 471; Thomas v. Stickle, 32 Iowa, 71; Stone v. Hooker, 9 Cow. 154; Green-vault v. Davis, 4 Hill, 643; Fowler v. Poling, 6 Barb. 165; Wood v. Forncrook, 3 Thomp. & C. 303; Brown v. Allen, 10 N. Y. Supp. 714; Hodges v. Latham, 98 N. C. 239, 3 S. E. Rep. 495; Grist v. Hodges, 3 Dev. 198; Haffey v. Birchett, 11 Leigh, 83; Turner v. Goodrich, 26 Vt. 707; Pitkin v. Leavitt, 13 Vt. 379; King v. Merk, 6 Mont. 172, 9 Pac. Rep. 827; Real v.

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A covenantee is not required to resist an action by the holder of the paramount title until actually dispossessed by legal process, but may recover against his covenantor after voluntarily surrendering to the holder of the better title; he, at most, assuming thereby the burden of establishing the title which he has thus recognized.<sup>1</sup>

A grantee who voluntarily surrenders possession of the whole land, warranted to one who claims only a part interest in it, cannot recover damages from the warrantor, as for an eviction from the whole tract, on the theory that the entry of the part owner was both for himself and his cotenants.<sup>2</sup>

There is no eviction where the grantee voluntarily abandons the property, and incites another, who is not shown to have title thereto, to claim it.<sup>3</sup>

**920.** There is a constructive eviction where the paramount title is offered for sale at public auction. The grantee in such case is justified in purchasing such paramount title, and he can sustain an action on the covenant of warranty although there was no actual eviction or disturbance of possession. There is no injustice done the grantor by this rule, for no action can be maintained against him upon his covenant in such a case except upon proof of the actual existence of a title superior to the one he conveyed, and which his grantor could not withstand at law.<sup>4</sup>

**921.** A purchaser who voluntarily surrenders the land to a third person, who asserts an adverse title, must establish the validity of the title he has recognized, before he can recover for a breach of warranty against his covenantor.<sup>5</sup> So, if he purchases

Hollister, 17 Neb. 661, 24 N. W. Rep. 333; Westrope v. Chambers, 51 Tex. 178.

<sup>1</sup> Real v. Hollister, 20 Neb. 114, 29 N. W. Rep. 189; Cheney v. Straube, 35 Neb. 521, 53 N. W. Rep. 479, 62 N. W. Rep. 234.

<sup>2</sup> McGrew v. Harmon, 164 Pa. St. 115, 30 Atl. Rep. 268.

<sup>3</sup> Hester v. Hunnicutt (Ala.), 16 So. Rep. 162.

<sup>4</sup> Loomis v. Bedell, 11 N. H. 74; Tucker v. Cooney, 34 Ill. 227; St. John v. Palmer, 5 Hill, 599; Whitney v. Dinsmore, 6 Cush. 124.

<sup>5</sup> McGrew v. Harmon, 164 Pa. St. 115, 30 Atl. Rep. 265; Clarke v. McAnulty, 3

Serg. & R. 364; Knepper v. Kurtz, 58 Pa. St. 480; Ogden v. Ball, 40 Minn. 94, 41 N. W. Rep. 453; Cheney v. Straube, 35 Neb. 521, 53 N. W. Rep. 479; Walker v. Kirshner (Kans.), 42 Pac. Rep. 596; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; George v. Putney, 4 Cush. 350; Lambert v. Estes, 99 Mo. 604, 13 S. W. Rep. 284; Hall v. Bray, 51 Mo. 288; Morgan v. Hann & St. Jo. R. Co. 63 Mo. 129; Ward v. Ashbrook, 78 Mo. 515; Beyer v. Schultze, 22 Jones & S. 212; Snyder v. Jennings, 15 Neb. 372; Clark v. Mumford, 62 Tex. 531; Woodford v. Leavenworth, 14 Ind. 311; Marvin v. Applegate, 18 Ind. 425; Crance v. Collenbaugh, 47

an outstanding title without waiting for an actual ouster, he must show the validity of that title before he can recover on his warranty.<sup>1</sup>

922. A judgment against a vendee establishing a paramount adverse title in another is binding upon the vendor if he was made a party to the action, or had notice of its pendency. The vendee in such case, in suing on the covenant of warranty, need not allege that the eviction was by a title paramount to that derived from the vendor, but may allege the judgment against him in an action to which the vendor was a party, or of the pendency of which he had been notified. If the vendor had due notice of the pendency of such suit against the vendee, the judgment therein was conclusive against him, and no further allegation or evidence of the adverse title is necessary in a suit by the vendee upon the warranty of title.<sup>2</sup>

923. Eviction under title paramount is not sustained by mere proof that judgment was rendered against the grantee in ejectment, and that he surrendered possession in obedience to the judgment, there being no evidence that his warrantor had any notice of the ejectment suit, or any opportunity to defend it, and none as to the title under which the grantee was ejected, or the time when that title originated.<sup>3</sup>

A judgment against the grantee involving the title to the land is admissible in evidence to show an eviction though the grantor was not notified of the suit or made a party to it; but he may be required to prove *aliunde* that the title upon which such judgment was obtained was in fact a paramount title.<sup>4</sup>

Ind. 256; Sheetz v. Longlois, 69 Ind. 498; Greenvault v. Davis, 4 Hill, 643; Thomas v. Stickle, 32 Iowa, 71; Cassidy's Succession, 40 La. Ann. 827, 5 So. Rep. 292; Huff v. Cumberland Val. Land Co. (Ky.) 30 S. W. Rep. 660; King v. Merk, 6 Mont. 172, 9 Pac. Rep. 827.

<sup>1</sup> Eversole v. Early, 80 Iowa, 601, 44 N. W. Rep. 897; Thomas v. Stickle, 32 Iowa, 71; Funk v. Creswell, 5 Iowa, 62; Turner v. Goodrich, 26 Vt. 707.

<sup>2</sup> Graham v. Dyer (Ky.), 29 S. W. Rep. 346; Jones v. Jones, 87 Ky. 42, 7 S. W. Rep. 886; Elliott v. Saufley, 89 Ky. 52, 11 S. W. Rep. 200; Woodward v. Allan, 3 Dana, 164; Cummins v. Kennedy, 3

Litt. 118, 124, 14 Am. Dec. 45; Thiele v. Axell, 5 Tex. Civ. App. 548, 24 S. W. Rep. 552.

<sup>3</sup> Haines v. Fort, 93 Ga. 24, 18 S. E. Rep. 994; Clements v. Collins, 59 Ga. 124; Gragg v. Richardson, 25 Ga. 566, 71 Am. Dec. 190; Maverick v. Routh (Tex. Civ. App.), 26 S. W. Rep. 1008; McGregor v. Tabor (Tex. Civ. App.), 26 S. W. Rep. 443.

<sup>4</sup> McGregor v. Tabor (Tex. Civ. App.), 26 S. W. Rep. 443; Johns v. Hardin, 81 Tex. 37, 16 S. W. Rep. 623; Ogburn v. Whitlow, 80 Tex. 239, 15 S. W. Rep. 807; Buchanan v. Kauffman, 65 Tex. 235; Clark v. Mumford, 62 Tex. 531; West-

924. A covenantor who has reasonable notice of an action of ejectment against his covenantee, and an opportunity to defend it, is bound by the judgment in such suit, and, when sued on his warranty, cannot be heard to show that the action of ejectment might have been successfully defended.<sup>1</sup> If there was a good defence he should have interposed it, or ever afterwards kept silent. In order to conclude a warranty by a judgment of eviction, "the notice must be distinct and unequivocal, and expressly require the party bound by the covenant to appear and defend the adverse suit."<sup>2</sup> The notice should be in writing,<sup>3</sup> though a parol notice has been held sufficient in a few cases.<sup>4</sup>

Tenants in common, who were owners of land subject to a mortgage, made partition of it, one of them assuming to pay the mortgage and covenanting that the part conveyed to the other was free of the incumbrance; thus not only making himself personally liable for the payment of the mortgage, but charging his part of the land primarily for its payment. This covenant was annexed to and passed with the land to a subsequent purchaser. The mortgage was foreclosed, and all the land covered by it was

rope v. Chambers, 51 Tex. 178; Peck v. Hensley, 20 Tex. 673.

<sup>1</sup> **Arkansas:** Collier v. Cowger, 52 Ark. 322, 12 S. W. Rep. 702. **Connecticut:** Hinds v. Allen, 34 Conn. 185. **Georgia:** Wimberly v. Collier, 32 Ga. 13. **Illinois:** McConnell v. Downs, 48 Ill. 271. **Indiana:** Bever v. North, 107 Ind. 544; Mooney v. Burchard, 84 Ind. 285. **Iowa:** Bellows v. Litchfield, 83 Iowa, 36, 48 N. W. Rep. 1062. **Kentucky:** Graham v. Dyer (Ky.), 29 S. W. Rep. 346; Jones v. Jones, 87 Ky. 82, 7 S. W. Rep. 886; Elliott v. Saufley, 89 Ky. 57, 11 S. W. Rep. 200; Woodward v. Allan, 3 Dana, 164; Cummins v. Kennedy, 3 Litt. 118, 124, 14 Am. Dec. 45. **Maine:** Williamson v. Williamson, 71 Me. 442. **Massachusetts:** Merritt v. Morse, 108 Mass. 270; Boyle v. Edwards, 114 Mass. 373; Hamilton v. Cutts, 4 Mass. 348. **Michigan:** Mason v. Kellogg, 38 Mich. 132. **Mississippi:** Cummings v. Harrison, 57 Miss. 275. **Missouri:** St. Louis v. Bissell, 46 Mo. 157. **Nevada:** Dalton v. Bowker, 8 Nev. 190. **New Jersey:** Chapman v. Holmes, 10

N. J. L. 20. **New York:** Jenks v. Quinn, 137 N. Y. 223, 33 N. E. Rep. 376; Kelly v. Dutch Church, 2 Hill, 105; Cooper v. Watson, 10 Wend. 202; Adams v. Conover, 22 Hun, 424. **Ohio:** Smith v. Dixon, 27 Ohio St. 471; King v. Kerr, 5 Ohio, 154, 158. **Pennsylvania:** Terry v. Drabestadt, 68 Pa. St. 400. **Tennessee:** Williams v. Burg, 9 Lea, 455; Greenlaw v. Williams, 2 Lea, 533. **Vermont:** Turner v. Goodrich, 26 Vt. 707; Pitkin v. Leavitt, 13 Vt. 379, where the purchaser brought suit to recover the land. **Wisconsin:** Eaton v. Lyman, 24 Wis. 438; Wendel v. North, 24 Wis. 223.

Otherwise in **North Carolina:** Wilder v. Ireland, 8 Jones L. 85.

<sup>2</sup> Rawle on Covenants, 5th ed. § 125; Wheelock v. Overshiner, 110 Mo. 100, 19 S. W. Rep. 640; Somers v. Schmidt, 24 Wis. 417, 421.

<sup>3</sup> Mason v. Kellogg, 38 Mich. 132; Chamberlain v. Preble, 11 Allen, 370, 373; Brown v. Taylor, 13 Vt. 631.

<sup>4</sup> Miner v. Clark, 15 Wend. 425, 427.



sold together to satisfy it. The covenantor had notice of a proposed sale of the premises on foreclosure, and promised to be present and protect the title, but did not appear, and the purchaser was evicted. In a suit on the covenant it was held that the purchaser was not chargeable with the consequences of omitting to inform the officer making the sale, though present at the time, of the facts by which other land was primarily charged with the payment of the mortgage, on the ground that the legal evidence of such facts could be found in a deed executed and recorded twenty years before, to which the purchaser was not a party, and as to the contents of which he was in fact wholly ignorant.<sup>1</sup>

Where a grantee is sued by an adverse claimant, and notifies the covenantor's agent to appear and defend the suit, and the agent practically carries on and controls the litigation, the covenantor is bound by the result.<sup>2</sup>

925. A judgment obtained against the grantee, in a suit of which the grantor had no notice, may be given in evidence to prove that the title on which it was founded was a paramount one, but it is not *prima facie* evidence of such a title. In an action against a warrantor, a judgment recovered against the purchaser in an action involving the title, to which the warrantor was not a party, is admissible to show an eviction of the purchaser, and that he had in fact yielded to such claim, if in addition the purchaser makes proof *aliunde* that that title was in fact superior to his. It is incumbent upon him to establish by competent and satisfactory evidence the existence and validity of the outstanding title.<sup>3</sup>

An eviction is not shown merely by a judgment for the recovery of the land, when such judgment was agreed to by the grantee without the warrantor's consent.<sup>4</sup>

<sup>1</sup> Jenks v. Quinn, 137 N. Y. 223, 33 N. E. Rep. 376.

<sup>2</sup> Bellows v. Litchfield, 83 Iowa, 36, 48 N. W. Rep. 1062; Graham v. Dyer (Ky.), 29 S. W. Rep. 346.

<sup>3</sup> McGregor v. Tabor (Tex. Civ. App.), 26 S. W. Rep. 443; Maverick v. Routh (Tex. Civ. App.), 26 S. W. Rep. 1008; Tarpley v. Poage, 2 Tex. 139, 148; Peck v. Hensley, 20 Tex. 673; Westrope v. Chambers, 51 Tex. 178; Clark v. Mumford, 62

Tex. 531; Buchanan v. Kauffman, 65 Tex. 235; Ogburn v. Whitlow, 80 Tex. 239, 15 S. W. Rep. 807; Johns v. Hardin, 81 Tex. 37, 16 S. W. Rep. 623; Wheelock v. Overshiner, 110 Mo. 100, 19 S. W. Rep. 640; Fields v. Hunter, 8 Mo. 128; Walker v. Deaver, 79 Mo. 664; Taylor v. Stewart, 54 Ga. 81; Pitkin v. Leavitt, 13 Vt. 379, 384.

<sup>4</sup> Maverick v. Routh (Tex. Civ. App.), 26 S. W. Rep. 1008.

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In an action for breach of covenant of warranty, a petition which describes the land, and alleges that the grantor had no title to it when he conveyed it to the plaintiff, and that such title was defeated in an action brought against the plaintiff by third persons, of the pendency of which action the grantor was notified, and which he was vouched in to defend, states a good cause of action.<sup>1</sup>

926. Eviction must be alleged as an issuable fact, and it is not sufficient to plead the evidence tending to show an eviction. The evidence may prove, though it does not constitute, the cause of action, and the pleader should set out the material or issuable facts.<sup>2</sup>

In an action for breach of warranty, and for equitable relief on the ground of mutual mistake because of a partial conflict in old surveys, ouster or offer to surrender possession need not be shown by plaintiff.<sup>3</sup>

Where plaintiff relies on a paramount title without eviction, defendant cannot object that the petition does not show the owner and his title, nor offer to reconvey the full unincumbered title acquired from defendant, when the petition alleges a prior grant to a third person; that defendant knew, and plaintiff was ignorant, of the existence of such prior grant when the conveyance was made to plaintiff; that defendant never had title in fee to the land so conveyed; and that plaintiff has never sold or incumbered the land.<sup>4</sup>

927. At common law, in an action for a breach of warranty, it was sufficient to allege in general terms an eviction under a paramount title.<sup>1</sup> In modern practice, and even under some of the codes of practice, it is not necessary to set out the facts which it is claimed constitute an eviction. It is sufficient to allege an eviction by the holder of a paramount title without pleading the facts.<sup>5</sup>

<sup>1</sup> Thiele v. Axell, 5 Tex. Civ. App. 548, 24 S. W. Rep. 552.

<sup>2</sup> Dillahunt v. Little Rock & Ft. S. Ry. Co. 59 Ark. 629, 27 S. W. Rep. 1002.

<sup>3</sup> Gass v. Sanger (Tex. Civ. App.), 30 S. W. Rep. 502.

<sup>4</sup> White v. Holley (Tex. Civ. App.), 24 S. W. Rep. 831.

<sup>5</sup> Townsend v. Morris, 6 Cow. 123; Rickert v. Snyder, 9 Wend. 416; Day v. Chism, 10 Wheat. 449; Kellog v. Platt, 33 N. J. L. 328; Elliott v. Saufley, 89 Ky. 52, 11 S. W. Rep. 200.

<sup>6</sup> Cheney v. Straube, 35 Neb. 521, 53 N. W. Rep. 479; Maxw. Code Pl. 648; Boone, Code Pl. 245.

Where the assignment of the breach is special, the special breach averred must be the breach proven; otherwise there will be a fatal variance between the allegations and the proof. A party cannot allege one thing, and, to support the same, prove a state of facts dissimilar thereto.<sup>1</sup>

A complaint alleging the making and delivery by defendant of a deed with covenants of warranty and peaceable enjoyment; that the premises were subject to a tax which the grantee was obliged to pay; and that, in an action to foreclose the purchase-money mortgage given back on the conveyance of the property, brought by the assignee of the mortgage, it was decided that the plaintiff was entitled to judgment of foreclosure and sale for the amount of the mortgage, less the tax so paid, but which does not allege that any judgment had been rendered adjudicating such tax a lien upon the premises, or that any judgment was entered in the foreclosure action, — does not state facts sufficient to constitute a cause of action for breach of the covenants.<sup>2</sup>

#### VI. *Covenants that run with the Land.*

928. The covenants of seisin and of good right to convey are broken, if at all, when the deed is delivered. They are personal covenants, and do not run with the land.<sup>3</sup> They are

<sup>1</sup> *Walker v. Kirshner* (Kans.), 42 Pac. Rep. 596; *Garvey v. Fowler*, 4 Sandf. 665; *Kansas Pac. Ry. v. Dunmeyer*, 19 Kans. 539; *Dugger v. Oglesby*, 3 Ill. App. 94.

<sup>2</sup> *Kidder v. Bork*, 12 Misc. 519, 33 N. Y. Supp. 663.

<sup>3</sup> **Alabama**: *Sayre v. Sheffield Land Co.* (Ala.) 18 So. Rep. 101; *Heflin v. Phillips*, 96 Ala. 561, 11 So. Rep. 729, 731; *Moore v. Johnston*, 87 Ala. 220, 6 So. Rep. 50; *Anderson v. Knox*, 20 Ala. 156. **Arkansas**: *Benton County v. Ruth-erford*, 33 Ark. 640; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Pate v. Mitchell*, 23 Ark. 590; *Hendricks v. Kee-see*, 32 Ark. 714. **California**: So by statute. Civ. Code 1895, § 1461; *Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Mont-gomery*, 37 Cal. 183. **Connecticut**: *But-ler v. Barnes*, 60 Conn. 170, 21 Atl. Rep. 419; *Mitchell v. Warner*, 5 Conn. 497;

*Davis v. Lyman*, 6 Conn. 249; *Hartford & S. Ore Co. v. Miller*, 41 Conn. 112; *Lockwood v. Sturdevant*, 6 Conn. 373. **Kentucky**: *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139; *Pence v. Duvall*, 9 B. Mon. 48. **Illinois**: *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Jones v. Warner*, 81 Ill. 343; *Clapp v. Herdman*, 25 Ill. App. 509; *Brady v. Spurck*, 27 Ill. 478. **Indiana**: In case the grantor has neither title nor possession. *Jackson v. Green*, 112 Ind. 341, 14 N. E. Rep. 89; *Craig v. Donovan*, 63 Ind. 513. See, however, § 929. **Iowa**: *Zent v. Picken*, 54 Iowa, 535; *Brandt v. Foster*, 5 Iowa, 287; *Sac County Bank v. Hooper*, 77 Iowa, 435. **Maine**: *Montgomery v. Reed*, 69 Me. 510; *Wilson v. Widenham*, 51 Me. 566; *Heath v. Whidden*, 24 Me. 383; *Boothby v. Hathaway*, 20 Me. 251; *Allen v. Little*, 36 Me. 170. Otherwise by statute. See § 929. **Massachusetts**:

covenants *in præsenti*, and their breach does not depend upon any future contingency. If the grantor is not well seised, and has not good right to convey when the deed is delivered, a right of action upon the covenants at once accrues.

If at the time of the conveyance the breach is only a technical one, for which nominal damages are recoverable, there may be a further action upon the covenant of warranty when there is an eviction of the grantee or any one having his title.<sup>1</sup> These covenants are to some extent cumulative. They are broken at different times, — the covenant of seisin at the time of the conveyance, and the covenant of warranty upon a subsequent eviction of the grantee. A judgment for nominal damages in an action upon the covenant of seisin is a bar to another action upon that covenant, although there is afterwards an eviction of the grantee, for which full damages should be recovered by the grantee; but to recover such damages he must sue upon the covenants of warranty and for quiet enjoyment. Of course, if there is a substantial breach of the covenant of seisin at the time of the conveyance, for which full damages are recovered, there can be no further recovery in an action upon the covenant of warranty.

*Smith v. Richards*, 155 Mass. 79, 28 N. E. Rep. 1132; *Bickford v. Page*, 2 Mass. 455; *Clark v. Swift*, 3 Met. 390; *Slater v. Rawson*, 1 Met. 450; *Thayer v. Clemence*, 22 Pick. 490. **Kansas**: *Dale v. Shively*, 8 Kans. 276; *Scoffins v. Grandstaff*, 12 Kans. 467. **Minnesota**: *Allen v. Allen*, 48 Minn. 462, 464, 51 N. W. Rep. 473; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. Rep. 453; *Kimball v. Bryant*, 25 Minn. 496. **Missouri**: *Adkins v. Tomlinson*, 121 Mo. 106, 26 S. W. Rep. 573; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. Rep. 142; *Murphy v. Price*, 48 Mo. 247. **Nebraska**: *Real v. Hollister*, 20 Neb. 112, 29 N. W. Rep. 189; *Chapman v. Kimball*, 7 Neb. 399; *Davidson v. Cox*, 10 Neb. 150. **New Hampshire**: *Dickey v. Weston*, 61 N. H. 23; *Smith v. Jefts*, 44 N. H. 482; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Morrison v. Underwood*, 20 N. H. 369. **New Jersey**: *Garrison v. Sandford*, 12 N. J. L. 261; *Chapman v. Holmes*, 10 N. J. L. 20; *Carter v. Denman*, 23 N. J. L. 260. **New York**:

*Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. Rep. 611, affirming 44 Hun, 31; *Hamilton v. Wilson*, 4 Johns. 72, 4 Am. Dec. 253; *Greenby v. Wilcocks*, 2 Johns. 1, 3 Am. Dec. 379, a leading case; *Abbott v. Allen*, 14 Johns. 248; *McCarty v. Leggett*, 3 Hill, 134; *Mott v. Palmer*, 1 N. Y. 564. **North Carolina**: *Price v. Deal*, 90 N. C. 290; *Grist v. Hodges*, 3 Dev. 198, 200. **North Dakota**: *Bowne v. Wolcott*, 1 N. Dak. 497, 48 N. W. Rep. 426. So provided by statute. **Dak. Comp. Laws**, § 3444. **Pennsylvania**: *Wilson v. Cochran*, 46 Pa. St. 229. **South Dakota**: **Dak. Comp. Laws** 1887, § 444. **Tennessee**: *Ingram v. Morgan*, 4 Humph. 66, 40 Am. Dec. 626; *Kennedy v. Norton*, 10 Heisk. 384. **Vermont**: *Clement v. Bank*, 61 Vt. 298, 17 Atl. Rep. 717; *Swasey v. Brooks*, 30 Vt. 692; *Garfield v. Williams*, 2 Vt. 327. **Texas**: *Westrope v. Chambers*, 51 Tex. 178.

<sup>1</sup> *Ogden v. Ball*, 40 Minn. 94, 41 N. W. Rep. 453; *Donnell v. Thompson*, 10 Me. 170, 25 Am. Dec. 216.

929. In a few States it is held, however, that this covenant is more than a covenant in the present tense; that it is rather a covenant of indemnity, and runs with the land to the extent that if the covenantee takes any estate, or even the possession, the covenant runs with the land and inures to the subsequent grantee, upon whom the loss falls.<sup>1</sup> This is the English rule.<sup>2</sup> The same construction is given to the covenant when it is implied under a statutory covenant.

According to these authorities, damages arising from the breach of this covenant may be assigned so as to enable the assignee to sue in his own name.<sup>3</sup> "The covenant is taken for the protection and assurance of the title which the grantor assumes to pass by his deed to the covenantee; and where the covenantee assumes to pass that title to another, it is fair to suppose that he intends to pass with it, for the protection of his grantee, every assurance

<sup>1</sup> **Colorado**: The covenants of seisin, peaceable possession, freedom from incumbrances, and of warranty, contained in any conveyance of real estate, of any interest therein, run with the premises, and to inure to the benefit of all subsequent purchasers and incumbrancers. Annot. Stats. 1891, § 436. **Indiana**: Overhiser v. McCollister, 10 Ind. 41; Martin v. Baker, 5 Blackf. 232; Coleman v. Lyman, 42 Ind. 289; Wright v. Nipple, 92 Ind. 310. **Iowa**: Boon v. McHenry, 55 Iowa, 202, 7 N. W. Rep. 503; Schofield v. Iowa Homestead Co. 32 Iowa, 317, 7 Am. Rep. 197. **Maine**: The assignee of a grantee may maintain an action on a covenant of seisin, or freedom from incumbrance, contained in absolute deeds of the premises between the parties, and recover such damages as the first grantee might have recovered on eviction, upon filing, for the use of his grantor, a release of the covenants of his deed and of all causes of action thereon. The prior grantee cannot, in such case, release the covenants of the first grantor to the prejudice of his grantee. R. S. 1883, ch. 82, § 18. See Wilson v. Widenham, 51 Me. 566; Trask v. Wilder, 50 Me. 450; Littlefield v. Pinkham, 72 Me. 369. **Missouri**: Allen v. Kennedy, 91 Mo. 324, 2 S. W. Rep.

142; Cockrell v. Proctor, 65 Mo. 41; Magwire v. Riggins, 44 Mo. 512; Chambers v. Smith, 23 Mo. 174; Dickson v. Desire, 23 Mo. 151; Hall v. Scott Co. 2 McCrary, 356; Schnelle & Q. Lumber Co. v. Barlow, 34 Fed. Rep. 853; Kimball v. Bryant, 25 Minn. 496. **Ohio**: If the grantor was in possession, and delivers possession to the grantee, there is a compliance with the covenant, and no action lies till an eviction, and the covenant runs with the land till that occurs. But if the grantor was not in possession, there is a breach of the covenant as soon as made, and the grantee alone can sue upon it. Lane v. Fury, 31 Ohio St. 574, 577; Stambaugh v. Smith, 23 Ohio St. 584, 588; Devore v. Sunderland, 17 Ohio St. 52; Foote v. Burnet, 10 Ohio, 317; Robinson v. Neil, 3 Ohio, 525; Backus v. McCoy, 3 Ohio, 211; Gest v. Kenner, 2 Handy, 86, 92. **Wisconsin**: Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68; Eaton v. Lyman, 24 Wis. 438, 30 Wis. 41, 49, 33 Wis. 34.

<sup>2</sup> Kingdon v. Nottle, 4 Maule & S. 53, 1 Maule & S. 355; King v. Jones, 5 Taunt. 418.

<sup>3</sup> Allen v. Kennedy, 91 Mo. 324, 2 S. W. Rep. 142; Van Doren v. Relfe, 20 Mo. 455.

of it that he has, whether resting in right of action or in unbroken covenant; so that if, before enforcing his remedy for breach of the covenant, the covenantee execute a conveyance of the land, unless there be something to show a contrary intention, it may be presumed that he intended to confer on his grantee the benefit of the covenant so far as necessary for his protection, — that is, that he intends to pass all his right to sue for the breach, so far as the grantee sustains injury by reason of it.”<sup>1</sup>

**930. The covenant against incumbrances is a personal one which does not run with the land.** It is broken the instant it is made, thus vesting in the covenantee a chose in action, which is not assignable, and therefore does not pass to his grantee or devisee.<sup>2</sup> The grantee can maintain no action upon it, and can-

<sup>1</sup> *Kimball v. Bryant*, 25 Minn. 496, 499, per Gilfillan, C. J.

<sup>2</sup> **Arkansas**: *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Brooks v. Moody*, 25 Ark. 452. **California**: So declared by statute. Civ. Code, § 1461. **Connecticut**: *Butler v. Barnes*, 60 Conn. 170, 192, 21 Atl. Rep. 419. **Illinois**: *Fuller v. Jillette*, 9 Biss. 296; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1, where there is an entire failure of title and the breach is complete. See § 931. **Massachusetts**: *Ladd v. Noyes*, 137 Mass. 151; *Osborne v. Atkins*, 6 Gray, 423; *Whitney v. Dinsmore*, 6 Cush. 124; *Clark v. Swift*, 3 Met. 390; *Thayer v. Clemence*, 22 Pick. 490; *Wyman v. Ballard*, 12 Mass. 304; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249. What effect is of the statute, Pub. Stats. 1882, ch. 126, § 18, giving a right of action to a grantee, his heirs, executor, administrator, successors, or assigns, for removing an incumbrance that appears of record, was left undetermined by the court in *Tibbetts v. Leeson*, 148 Mass. 102, 18 N. E. Rep. 679. **Michigan**: *Post v. Campau*, 42 Mich. 90, 3 N. W. Rep. 272; *Davenport v. Davenport*, 52 Mich. 587, 18 N. W. Rep. 371. **Nebraska**: *Campbell v. McClure* (Neb.), 63 N. W. Rep. 920; *Chapman v. Kimball*, 7 Neb. 399; *Mills v. Saunders*, 4 Neb. 190. **New Hampshire**: *Russ v. Perry*, 49 N.

H. 547; *Morrison v. Underwood*, 20 N. H. 369; *Andrews v. Davison*, 17 N. H. 413, 43 Am. Dec. 606. **New Jersey**: *Garrison v. Sandford*, 12 N. J. L. 261; *Stewart v. Drake*, 9 N. J. L. 139; *Carter v. Denman*, 23 N. J. L. 260, 273. **New York**: *Greenby v. Wilcocks*, 2 Johns. 1, 3 Am. Dec. 379; *Hamilton v. Wilson*, 4 Johns. 72, 4 Am. Dec. 253; 2 Wait, Act. & Def. 380. By statute in this State, choses in action are assignable (Code Civil Proc. § 1910); and since this statute a disposition has been shown to repudiate the ancient rule, and to permit the grantee or devisee of the covenantee, if he suffers from the breach of the covenant, to resort to the covenant for protection and redress. *Boyd v. Belmont*, 58 How. Pr. 513; *Ernst v. Parsons*, 54 How. Pr. 163; *Andrews v. Appel*, 22 Hun, 429; *Colby v. Osgood*, 29 Barb. 339; *Coleman v. Brisnahan*, 8 N. Y. Supp. 158. **North Dakota**: So by statute. R. Codes 1895, § 3785. **Pennsylvania**: *Cathcart v. Bowman*, 5 Pa. St. 317; *Funk v. Voneida*, 11 S. & R. 109, 14 Am. Dec. 617; *Wilson v. Cochran*, 46 Pa. St. 229. **South Dakota**: So by statute. Comp. Laws 1887, § 3444. **Vermont**: *Potter v. Taylor*, 6 Vt. 676; *Swasey v. Brooks*, 30 Vt. 692. See, however, § 931. **Virginia**: *Marbury v. Thornton*, 82 Va. 702, 1 S. E. Rep. 909.

not assert it by way of estoppel, since he acquired no interest in it.

931. In several States, however, the covenant against incumbrances runs with the land.<sup>1</sup> Where the incumbrance is one that may be extinguished by payment, and for which the covenantee has only nominal damages until he extinguishes it, the covenant runs with the land, and remains alive in the hands of a subsequent grantee who may be compelled to extinguish such incumbrance. Until such payment of the incumbrance, there is no substantial breach of the covenant for which damages may be recovered.<sup>2</sup> "Where the covenant of seisin is broken and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all; actual damages, and all the damages that can result from the breach, have accrued; the measure of damages is the purchase-money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of choses in action. But as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. And where there is the barren right of recovery of only nominal damages, the right of action is one only in name, and is essentially no right of action."<sup>3</sup> If substantial damages have been recovered for a breach, a second action on the covenant cannot be had for a further breach of the covenant.<sup>4</sup>

For a breach of the covenant occurring during the lifetime of the covenantee his administrator must sue. The covenant cannot

<sup>1</sup> *Colorado*: So by statute. Annot. Stats. 1891, § 436. *Illinois*: *Richard v. Bent*, 59 Ill. 38. *Indiana*: *Martin v. Baker*, 5 Blackf. 232; *Overhiser v. McCollister*, 10 Ind. 41. *Maine*: Assignee may sue provided he releases his immediate grantor. R. S. 1883, ch. 82, § 18. *Missouri*: *Hunt v. Marsh*, 80 Mo. 396; *Walker v. Deaver*, 79 Mo. 664; *Dickson v. Desire*, 23 Mo. 151. *Ohio*: *Devore v. Sunderland*, 17 Ohio St. 52, 60; *Foot v. Burnet*, 10 Ohio, 317; *Backus v. McCoy*, Ohio, 211. *South Carolina*: *M'Crary v.*

*Brisbane*, 1 Nott & McCord, 104; *Jeter v. Glenn*, 9 Rich. 374. *Vermont*: *Cole v. Kimball*, 52 Vt. 639. *Wisconsin*: *Eaton v. Lyman*, 30 Wis. 41; *Mecklem v. Blake*, 22 Wis. 495; *Pillsbury v. Mitchell*, 5 Wis. 17.

<sup>2</sup> *Buren v. Hubbell*, 54 Mo. App. 617; *Barnhart v. Hughes*, 46 Mo. App. 318; *Winningham v. Pennock*, 36 Mo. App. 688.

<sup>3</sup> *Richard v. Bent*, 59 Ill. 38, per *Sheldon, J.*

<sup>4</sup> *Taylor v. Heitz*, 87 Mo. 660.

run with the land after such breach, or descend to the heir.<sup>1</sup> After breach the covenant is turned into a mere right of action, which can be taken advantage of only by the covenantee or his personal representative. It cannot pass to an heir, devisee, or subsequent purchaser.<sup>2</sup>

In Indiana a covenant against incumbrances embraced in the statutory form of deeds of general warranty is one that runs with the land. "For this rule the statute and the comprehensive form of the warranty used by virtue thereof supply the reason. The term 'convey and warrant' is construed as containing covenants not only of title and seisin, and against incumbrances, but also for quiet enjoyment; and, where the original grantor either had the title or was in possession under claim of title, such covenant is *in futuro* and runs with the land.<sup>3</sup> . . . Usually, it is true, a special covenant against incumbrances is *in presenti*, and does not run with the land, as such covenant is broken as soon as made, and vests the right of action at once in the immediate covenantee, and in him alone, or, in case of his death, in his legal representative; but it is otherwise where the covenant against incumbrances is embraced in the general warranty. In that case, any breach calculated to disturb the grantee in the enjoyment of his property is covered by his covenant, embracing as it does a guaranty for future as well as present enjoyment. He may wait until he is evicted and then sue, or he may pay off the incumbrance and bring his action, provided he finds it necessary to extinguish the incumbrance in order to ward off an eviction if the land is legally bound."<sup>4</sup>

**932. The covenants for warranty and quiet enjoyment run with the land.** The authorities are uniform to this effect.<sup>5</sup>

<sup>1</sup> Frink v. Bellis, 33 Ind. 135.

<sup>2</sup> Buren v. Hubbell, 54 Mo. App. 617; Blondeau v. Sheridan, 81 Mo. 545; Kellogg v. Malin, 62 Mo. 429, 50 Mo. 496; Taylor v. Heitz, 87 Mo. 660.

<sup>3</sup> Worley v. Hineman, 6 Ind. App. 240, 244, 33 N. E. Rep. 260, per Reinhard, C. J.; Dehority v. Wright, 101 Ind. 382.

<sup>4</sup> Jackson v. Green, 112 Ind. 341, 14 N. E. Rep. 89; Sinker v. Floyd, 104 Ind. 291, 4 N. E. Rep. 10; Black v. Duncan, 60 Ind. 522; Coleman v. Lyman, 42 Ind. 289.

<sup>5</sup> California, North Dakota, South Dakota: The only covenants that run with the land are those of warranty, for quiet enjoyment, and further assurance. Cal. Civ. Code, § 1461; N. Dak. R. Codes 1895, § 3785; S. Dak. Comp. Laws 1887, § 3445. Connecticut: Butler v. Barnes, 60 Conn. 170, 21 Atl. Rep. 419; Booth v. Starr, 1 Conn. 244, 246, 6 Am. Dec. 233. Illinois: Barry v. Guild, 126 Ill. 439, 18 N. E. Rep. 759. Maine: Crooker v. Jewell, 29 Me. 527; Allen v. Little, 36 Me. 170. Massachusetts: White v. Whitney,



The covenant runs with the land as an incident, although the grantor had neither the legal title nor possession, provided possession passed to the grantee. "The covenant attached to a grant does not pass by the deed from the covenantor to his assignee, but only by the land conveyed. It passes, not by the form of the conveyance, but merely as an incident to the land; so, when the grantee takes no estate under the grant, no assignment of the land by him can transfer it to the assignee. As it is not capable of a direct transfer, so as to enable the assignee to maintain an action for its breach in his own name, it cannot pass by the operation of the assignment, for it cannot run with the land which the grantee does not have to convey. It is stated that in England, when nothing but bare possession of the land passes by the conveyance, the covenant does not pass, either by the direct or indirect operation of the assignment. But the tendency of the American cases is to hold that possession is a sufficient estate to cause the covenant to attach to the land, and, upon an assignment or transfer of the land by the covenantor, to pass to the assignee. Possession is an estate that in time may ripen into a perfect title."<sup>1</sup>

A deed that passes the legal title carries the right of possession, and gives constructive possession without an actual entry by the grantee. When he takes actual possession of the premises, having the legal title, the covenant of warranty running with the land inures to his benefit.<sup>2</sup>

**933.** Any deed that transfers the title passes to the grantee the benefit of a covenant that runs with the land. Such is the effect of a quitclaim deed, or a deed of release without cove-

3 Met. 81. **Nebraska**: *Real v. Hollister*, 17 Neb. 661, 665, 24 N. W. Rep. 333. **New Hampshire**: *Chandler v. Brown*, 59 N. H. 370; *Moore v. Merrill*, 17 N. H. 75, 81, 43 Am. Dec. 593; *Chase v. Weston*, 12 N. H. 413. **New Jersey**: *Carter v. Denman*, 23 N. J. L. 260. **New York**: *Rindskopf v. Farmers' L. & T. Co.* 58 Barb. 36. **Tennessee**: *Lawrence v. Senter*, 4 Sued. 52. **Texas**: *Alvord v. Waggoner* (Tex. Civ. App.), 29 S. W. Rep. 797; *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. Rep. 212; *Saunders v. Flaniken*, 77 Tex. 662, 14 S. W. Rep. 236. **Vermont**: *Til-*

*lotson v. Prichard*, 60 Vt. 94, 14 Atl. Rep. 302; *Wilder v. Davenport*, 58 Vt. 642, 5 Atl. Rep. 753; *Williams v. Wetherbee*, 1 Aik. 233. **Virginia**: *Marbury v. Thornton*, 82 Va. 702, 1 S. E. Rep. 909.

<sup>1</sup> *Tillotson v. Prichard*, 60 Vt. 94, 101, 14 Atl. Rep. 302, per Taft, J., citing *Rawle on Covenants*, § 233; 1 *Smith's Leading Cases*, 183, in the notes to *Spencer's Case*, 5 Coke, 16.

<sup>2</sup> *Chandler v. Brown*, 59 N. H. 370; *Moore v. Merrill*, 17 N. H. 75, 81, 43 Am. Dec. 593.

COVENANTS THAT RUN WITH THE LAND. [§§ 934-936.]

nants,<sup>1</sup> and of a deed without covenants to a purchaser at a judicial sale.<sup>2</sup>

934. The covenant of warranty does not pass to a subsequent purchaser at a tax sale, for the title under such deed is not derivative, but new and independent.<sup>3</sup>

935. Covenants that run with the mortgaged land inure to the covenantee's mortgagee and his grantees, in proportion to their shares and interests. They inure to the benefit of a purchaser at the foreclosure sale.<sup>4</sup>

936. A remote grantee, when evicted, may sue any or all of the grantors in the line of the title who conveyed with covenants of warranty, until he has obtained satisfaction, and there can of course be but one satisfaction.<sup>5</sup> But no intermediate

<sup>1</sup> *Jenks v. Quinn*, 137 N. Y. 223, 230, affirming 61 Hun. 427; *Hunt v. Amidon*, 4 Hill, 345, 40 Am. Dec. 283; *Jackson v. Groat*, 7 Cow. 285; *Beddoe v. Wadsworth*, 21 Wend. 120; *Wilson v. Widenham*, 51 Me. 566; *Chandler v. Brown*, 59 N. H. 370; *Warren v. Cochran*, 30 N. H. 379; *Moore v. Merrill*, 17 N. H. 75, 81, 43 Am. Dec. 593; *Hunt v. Middlesworth*, 44 Mich. 448; *Thomas v. Bland*, 91 Ky. 1, 14 S. W. Rep. 955; *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149; *Brady v. Spurck*, 27 Ill. 478; *Claycomb v. Munger*, 51 Ill. 373.

<sup>2</sup> *White v. Whitney*, 3 Met. 81; *Thayer v. Clemence*, 22 Pick. 490; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593. **Kentucky**: *Thomas v. Bland*, 91 Ky. 1, 14 S. W. Rep. 955; *Cummins v. Kennedy*, 3 Litt. 118, 121, 14 Am. Dec. 45; *Young v. Triplett*, 5 Litt. 248; *Hunt v. Orwig*, 17 B. Mon. 73, 66 Am. Dec. 144; *Perkins v. Coleman*, 90 Ky. 611, 14 S. W. Rep. 640; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Fisk v. Cathcart*, 3 Colo. App. 374, 33 Pac. Rep. 1004; *Saunders v. Franklin*, 77 Tex. 662, 14 S. W. Rep. 236; *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. Rep. 212; *Town v. Needham*, 3 Paige, 545, 24 Am. Dec. 246; *Redwine v. Brown*, 10 Ga. 311. So by statute. R. Code 1882, § 2623; *Lewis v. Cook*, 13 Ired. L. 193; *M'Cready v. Brisbane*, 1 Nott. & M. 104, 9 Am. Dec. 676; *Markland v. Crump*, 1 Dev. & B. 94,

27 Am. Dec. 230; *Carter v. Denman*, 23 N. J. L. 260; *White v. Presly*, 54 Miss. 313.

In Georgia it is provided by statute that the purchaser of land obtains with the title, however conveyed to him, at public or private sale, all the rights which any former owner of the land, under whom he claims, may have had by virtue of any covenants of warranty of title, or of quiet enjoyment, or of freedom from incumbrances, contained in the conveyance from any former grantor, unless the transmission of such covenants with the land is expressly negated in the covenant itself. Code 1882, § 2702.

<sup>3</sup> *Bellows v. Litchfield*, 81 Iowa, 36, 48 N. W. Rep. 1062; *Crum v. Cotting*, 22 Iowa, 411.

<sup>4</sup> *White v. Whitney*, 3 Met. 81; *Tufts v. Adams*, 8 Pick. 547; *Mygatt v. Coe*, 142 N. Y. 78, 36 N. E. Rep. 870; *Lane v. Woodruff*, 1 Kans. App. 241, 40 Pac. Rep. 1079; *Town v. Needham*, 3 Paige, 545, 24 Am. Dec. 246; *Andrews v. Wolcott*, 16 Barb. 21; *Rose v. Schaffner*, 50 Iowa, 483; *Wilder v. Davenport*, 58 Vt. 642, 5 Atl. Rep. 753; *M'Murphy v. Minot*, 4 N. H. 251; *Cavis v. McClary*, 5 N. H. 529.

<sup>5</sup> *Crooker v. Jewell*, 29 Me. 527; *Withy v. Mumford*, 5 Cow. 137; *Crisfield v. Storr*, 36 Md. 129; *Wilson v. Taylor*, 9 Ohio St. 595; *King v. Kerr*, 5 Ohio, 154;

grantee can sue any of the preceding grantors until he has been evicted, or compelled to pay damages upon his own warranty.<sup>1</sup> "Every assignee may, for a breach of such covenant, maintain an action against all or any of the prior warrantors till he has obtained satisfaction. This results from the nature of the covenant, for each covenantor covenants with the covenantee and his assigns; and as the lands are transferable it was reasonable that covenants annexed to them should be transferred. . . . The nature, then, of the engagement of the first covenantor is to indemnify all the subsequent covenantees from all damages arising from his breach of the covenant."<sup>2</sup>

**937.** Damages arising from broken covenants do not run with the land, though the covenants themselves do.<sup>3</sup> Such damages do not inure to the subsequent grantees of the title. Therefore, after a covenant of warranty and for quiet enjoyment is broken by an eviction under a paramount title, it no longer runs with the land, and a subsequent grantee has no right of action upon it.<sup>4</sup>

**938.** If the covenant is in fact personal, it does not run with the land merely because it is to the grantee, "his heirs and assigns." The Court of Appeals of New York has recently said:<sup>5</sup> "Whatever confusion may exist in the cases with reference to the use of these words, it is clear that they cannot dispense with some privity of estate in order to carry the covenant with the land; and it has never been held that a covenant which, in its nature or otherwise, is personal, is made to run with the land by the mere employment of these words."

**939.** A suit upon the covenant must be maintained by the

*Claycomb v. Munger*, 51 Ill. 373; *Cummings v. Harrison*, 57 Miss. 275.

<sup>1</sup> *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233.

<sup>2</sup> *Booth v. Starr*, 1 Conn. 244, 246, 249, 6 Am. Dec. 233, per Swift, J.

<sup>3</sup> *Provident Life & T. Co. v. Fiss*, 147 Pa. St. 232, 23 Atl. Rep. 560; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. Rep. 909; *Demarest v. Willard*, 8 Cow. 206; *Davis v. Lyman*, 6 Conn. 249; *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381; *Garrison v. Sandford*, 12 N. J. L. 261; *Ladd v. Noyes*, 137 Mass. 151.

<sup>4</sup> *Barry v. Guild*, 28 Ill. App. 39.

<sup>5</sup> *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. Rep. 17, per O'Brien, J., citing Rawle, Cov. §§ 2, 203; *Norcross v. James*, 140 Mass. 188, 2 N. E. Rep. 946; *Dart. Vend.* (5th ed.) 777, 778; *Sngd. Vend.* 577, 578; *Hurd v. Curtis*, 19 Pick. 459; *Jacques v. Short*, 20 Barb. 269; *Andrews v. Appel*, 22 Hun, 429; *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. Rep. 275; *Dexter v. Beard*, 130 N. Y. 549, 29 N. E. Rep. 983. And see *Mygatt v. Coe*, 142 N. Y. 78, 36 N. E. Rep. 870.

person in whom the title stands at the time. The covenantee cannot maintain an action upon it after he has parted with his title.<sup>1</sup> If a grantee in a warranty deed has himself conveyed part of the land with warranty, he cannot recover of his grantor on the warranty, as to the part which he has conveyed, till he has satisfied his grantee's claim.<sup>2</sup>

The benefit of the covenant runs to the purchaser of any part of the land to which the warranty applies, and such purchaser may maintain a suit separately in respect of the part he has purchased.<sup>3</sup> In California, North Dakota, and South Dakota it is provided by statute that a covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property. No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it, or ceased to enjoy its benefits. Where several persons, holding by several titles, are subject to the burden, or entitled to the benefit, of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and, if not, then according to their respective interests in point of quantity.<sup>4</sup>

940. Possession alone has been held to be sufficient to make the grantor's covenants binding upon his heirs and assigns. A husband and wife joined in a deed of her real estate with covenants of warranty. It appeared that the husband was at the time in possession of the land, and his wife occupied the premises with him; that she had color of title, but he not

<sup>1</sup> Bickford v. Page, 2 Mass. 455, 460; Booth v. Starr, 1 Conn. 244; Jones v. Richmond, 88 Va. 231, 13 S. E. Rep. 414; Kane v. Sanger, 14 Johns. 89; Cunningham v. Knight, 1 Barb. 399; Keith v. Day, 15 Vt. 660; Tillotson v. Prichard, 60 Vt. 94; Crooker v. Jewell, 29 Me. 527; Hunt v. Middlesworth, 44 Mich. 448, 7 N. W. Rep. 57; Claycomb v. Munger, 51 Ill. 373; Thompson v. Sanders, 5 T. B. Mon. 357.

<sup>2</sup> Alvord v. Waggoner (Tex.), 32 S. W. Rep. 872, reversing same case, 29 S. W. Rep. 797; Booth v. Starr, 1 Conn.

244, 248, 6 Am. Dec. 233; Withy v. Mumford, 5 Cow. 137; Wheeler v. Sohler, 3 Cush. 219; Barnett v. Barbour, 1 Litt. (Ky.) 396; Whitzman v. Hirsh, 87 Tenn. 513, 11 S. W. Rep. 421.

<sup>3</sup> Lamb v. Danforth, 59 Me. 322; Swett v. Patrick, 12 Me. 9; Kane v. Sanger, 14 Johns. 89; Dickinson v. Hoomes, 8 Gratt. 406; Brown v. Metz, 33 Ill. 339; Whitzman v. Hirsh, 87 Tenn. 513.

<sup>4</sup> California: Civ. Code, §§ 1462-1467. North Dakota: R. Codes 1895, §§ 3786-3791. South Dakota: Comp. Laws 1887, §§ 3443-3450.

even that; that the two assumed, as joint grantors, to convey the land; that the husband delivered the possession to the purchaser, which was the only estate which either grantor had, or which they could convey; and that the husband shared in the purchase-money paid for the grant. On this state of facts it was held that the husband was not a stranger to the title, and merely an independent covenantor; that his possession was an estate in the land which his deed transferred to the purchaser; and that to this his covenant of warranty attached, and henceforth ran with the land.<sup>1</sup> Mr. Justice Finch, delivering the judgment of the Court of Appeals of New York to this effect, said: "It is certainly the law of this State that one in possession of land merely, without other actual title, has an estate in the land which he may transfer to a grantee, and which is sufficient to carry with it his covenant of warranty down the line of succession.<sup>2</sup> . . . We have here, then, a situation in which the defendant was in possession of land, and so had an estate in it; where he assumed to transfer it as grantor by deed; where he transferred his possession to the grantee; where he received in exchange some part or the whole of the consideration of the grant; where his wife, who joined in the deed, had no better title than his, whatever he may have thought about it; where he meant and intended that his warranty should run to assigns, and expressed that intention on the face of his covenant. It is impossible, on such a state of facts, to deem him a stranger to the title, and merely an independent covenantor."

941. But, the same case coming again before the court, it was finally held that the legal possession which will carry the covenants must be founded upon a valid right or interest in the nature of property. Therefore it was held that where a husband and wife live on her land, and he does such acts merely as grow out of the marital relations, and which must exist in every case where a husband lives with his wife in her home on her land, he does not have such possession as will constitute a covenant for quiet enjoyment, contained in their deed of such land, a covenant by him running with the land which inures to

<sup>1</sup> *Mygatt v. Coe*, 142 N. Y. 78, 36 N. E. Rep. 870.

<sup>2</sup> That was explicitly held in *Beddoe v. Wadsworth*, 21 Wend. 120, 124; "and,"

continued the learned judge, "I have found no case in this State to the contrary, and no reason to doubt the soundness of the doctrine."

the covenantee's grantee.<sup>1</sup> "The presumption is," say the court, "that the legal possession follows the ownership of the land. Hence it was necessary to show that the wife, by some act or agreement on her part, express or implied, had surrendered to the husband some interest in the property or dominion over it which necessarily took from her at least some right or incident ordinarily pertaining to the absolute ownership of real estate. The husband could acquire no estate capable of sale or conveyance, not even the lowest known to the law, without abridging to the same extent that of the wife. Whatever interest he gained she must have lost. . . . It is difficult to conceive how two persons can have such a possession of the same thing at the same time. The wife in this case certainly acquired such a possession upon the conveyance to her, and there was no evidence to warrant the conclusion that she had in any way transferred it to the husband."

942. The covenant of a stranger to a title does not run with the land.<sup>2</sup> A covenant will not run with the land unless there is either mutuality or succession of interest. Privity of contract is sufficient between the immediate parties, but there must be privity of estate to carry the benefit of the covenant to subsequent owners of the property to which the covenant relates. Lord Kenyon, in a leading case, said: "It is not sufficient that a covenant is concerning the land, but in order to make it run with the land there must be a privity of estate between the covenanting parties."<sup>3</sup> In a recent case in New York, when it was for

<sup>1</sup> *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. Rep. 17, Haight and Finch, JJ., dissenting.

<sup>2</sup> *Platt, Cov.* 461; *Bally v. Wells*, 3 Wils. 25; *Hurd v. Curtis*, 19 Pick. 459; *Slater v. Rawson*, 1 Metc. 450; *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. Rep. 611, 142 N. Y. 78, 36 N. E. Rep. 870, 147 N. Y. 456, 42 N. E. Rep. 17; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. Rep. 49.

Opposed to these authorities are: *Pakenham's Case* (Y. B. 42 Edw. III. 3), commonly known as the "Prior and Convent Case," and Judge Hare's learned note to *Spencer's Case*, 5 Coke, 16, in the 8th edition of *Smith's Leading Cases*, vol. i. p. 192; *Dickinson v. Hoomes*, 8 Gratt. 353,

406; the dissenting opinion in *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. Rep. 611.

In *Lydick v. Balt. & O. R. Co.* 17 W. Va. 427, the court refers to the conflicting views on the question as to whether the covenant of a stranger runs with the land, and says: "It is not necessary in this case to determine which of these views is sound; for, in the case before us, the requisite privity of estate exists."

<sup>3</sup> *Webb v. Russell*, 3 Term R. 393, affirmed in the Exchequer Chamber, 1 H. Black. 563, approved in *Keppell v. Bailey*, 2 Mylne & K. 517, 543, where the cases were reviewed by Brougham, Lord Chancellor, and again it was directly held

the third time before the Court of Appeals for review, O'Brien, J., for the court said:<sup>1</sup> "The distinction between personal covenants in deeds and those which run with the land was made at a time when, by the common law, choses in action were not assignable, and this circumstance, doubtless, was an element in the process of reasoning through which the rule was established. Since choses in action are now assignable, it may well be doubted whether the reason of the rule still exists in all its force. When a person who is a stranger to the title consents to become a party to the conveyance for the benefit of the land, and in order to enhance the value of the estate conveyed, it is not difficult to suggest arguments, based upon reason and justice, for holding him to his stipulation in favor of a remote as well as an immediate grantee. But the law for this case, at least, seems to be settled otherwise, and, doubtless, according to the weight of authority."

#### VII. *Measure of Damages on Covenant for Seisin.*

**943.** The measure of damages for a breach of the covenant of seisin, when no interest has passed, or even possession, is the consideration paid with interest.<sup>2</sup> This, as between the par-

that a covenant between a covenantor and a covenantee, between whom there was no privity in estate, does not run with the land. See Professor Washburn's learned treatise, 3 Washb. Real Property, 5th ed. p. 501.

<sup>1</sup> *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. Rep. 17.

<sup>2</sup> *Alabama*: *Bibb v. Freeman*, 59 Ala. 612; *Copeland v. McAdory*, 100 Ala. 553, 13 So. Rep. 545. *Arkansas*: *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338. *California, North Dakota, South Dakota*: The detriment caused by the breach of a covenant of seisin, of right to convey, of warranty, or of quiet enjoyment, in a grant of an estate in real property, is deemed to be: 1. The price paid to the grantor, or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property; 2. Interest thereon for the time during which the grantee

derived no benefit from the property, not exceeding five years; 3. Any expenses properly incurred by the covenantee in defending his possession. *California*: Civ. Code, § 3304. *North Dakota*: R. Codes 1895, § 4981. *South Dakota*: Comp. Laws 1887, § 4584. *Connecticut*: *Hartford & Salisbury Ore Co. v. Miller*, 41 Conn. 112; *Sterling v. Peet*, 14 Conn. 245. *Illinois*: *Horne v. Walton*, 117 Ill. 130; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Weber v. Anderson*, 73 Ill. 439. *Indiana*: *Rhea v. Swain*, 122 Ind. 272; *Wilson v. Peelle*, 78 Ind. 384; *Wright v. Nipple*, 92 Ind. 310. *Iowa*: *Zent v. Picken*, 54 Iowa, 535; *Brandt v. Foster*, 5 Iowa, 287; *Norman v. Winch*, 65 Iowa, 263. *Kentucky*: *Mercantile Trust Co. v. South Park Residence Co.* 94 Ky. 271, 22 S. W. Rep. 314; *Coshy v. West*, 2 Bibb, 568; *Thompson v. Jones*, 11 Bush, 353; *Robertson v. Lemon*, 2 Bush, 301. *Maine*: *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Montgomery v. Reed*, 69 Me.

ties; is the agreed value of the land, or, in other words, the consideration of the conveyance. The rule is based upon the supposition that the grantee took nothing by the conveyance, for the reason that the grantor had no interest to convey. The rule is, therefore, limited to cases where there has been a total breach of the covenant, and no interest has passed to the grantee by the conveyance. It is limited to cases where no semblance of title or benefit whatever has passed; where the grantee has derived no advantage whatever from it, and can derive none without a wrongful entry upon the estate of another. When, therefore, the grantee has recovered damages for a complete breach of the covenant, and this fact appears of record in the suit, the grantor is entitled to reënter, and the grantee cannot set up the conveyance by way of estoppel.

Full damages, measured by the consideration paid and interest, cannot be recovered, in case the grantee has entered into and holds possession, until there has been an eviction by title paramount, either actual or constructive.<sup>1</sup>

510; *Stubbs v. Page*, 2 Me. 378. **Massachusetts**: *Bickford v. Page*, 2 Mass. 455; *Sumner v. Williams*, 8 Mass. 162; *Harris v. Newell*, 8 Mass. 262; *Marston v. Hobbs*, 2 Mass. 433, 43 Am. Dec. 611; *Chapel v. Bull*, 17 Mass. 213; *Smith v. Strong*, 14 Pick. 128; *Jenkins v. Hopkins*, 8 Pick. 346; *Whiting v. Dewey*, 15 Pick. 428; *Hodges v. Thayer*, 110 Mass. 286. **Minnesota**: *Kimball v. Bryant*, 25 Minn. 496. **Mississippi**: *Herndon v. Harrison*, 34 Miss. 486, 69 Am. Dec. 399; *Phipps v. Tarpley*, 31 Miss. 433. **Missouri**: *Murphy v. Price*, 48 Mo. 247; *Lawless v. Collier*, 19 Mo. 480; *Martin v. Long*, 3 Mo. 391; *St. Louis v. Bissell*, 46 Mo. 157. **New Hampshire**: *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Nutting v. Herbert*, 35 N. H. 120, 127; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Foster v. Thompson*, 41 N. H. 373. **New York**: *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254; *Caulkins v. Harris*, 9 Johns. 324; *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229. **North Carolina**: *Price v. Deal*, 90 N. C. 290; *Wilson v. Forbes*, 2 Dev. 30; *Farmers' Bank v. Glenn*, 68 N.

C. 35. **North Dakota**: *Bowne v. Wolcott*, 1 N. Dak. 415, 497, 48 N. W. Rep. 336, 426. **Ohio**: *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585. **Oregon**: *Stark v. Olney*, 3 Oreg. 88. **Pennsylvania**: *Cox v. Henry*, 32 Pa. St. 18; *Weiting v. Nissley*, 13 Pa. St. 650. **Tennessee**: *Kincaid v. Brittain*, 5 Sneed, 119; *Park v. Cheek*, 4 Cald. 20. **Vermont**: *Blake v. Burnham*, 29 Vt. 437. **Wisconsin**: *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. Rep. 764; *Daggett v. Reas*, 79 Wis. 60, 48 N. W. Rep. 127; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. Rep. 6; *Conrad v. Trustees*, 64 Wis. 258, 25 N. W. Rep. 24; *Semple v. Whorton*, 68 Wis. 626, 32 N. W. Rep. 690; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. Rep. 405.

<sup>1</sup> *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. Rep. 764; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Horton v. Arnold*, 18 Wis. 212; *Taft v. Kessel*, 16 Wis. 273; *Hill v. Butler*, 6 Ohio St. 207; *Small v. Reeves*, 14 Ind. 163.



This is the general rule of damages for a breach of the covenants of warranty and quiet enjoyment, and the covenant against incumbrances, when the breach is such as to wholly defeat the estate conveyed, though there are exceptions, which will be noted in the divisions of this chapter in which the rules of damages for breaches of those covenants are particularly considered.<sup>1</sup>

**944.** For a breach of any covenant, by reason of a failure of the title to a part of the land conveyed, the measure of damages, when determined by the consideration paid, is such fractional part of the whole consideration as the value, at the time of the purchase, of the part to which the title failed bears to the whole, and interest thereon during the time the grantee has been deprived of the use of the part to which the title failed, but not exceeding six years.<sup>2</sup> The rule is the same whether the

<sup>1</sup> See divisions VIII. and IX.

<sup>2</sup> *Griffin v. Reynolds*, 17 How. 609. **Illinois**: *Major v. Dunnavant*, 25 Ill. 262; *Clapp v. Herdman*, 25 Ill. App. 509; *Tone v. Wilson*, 81 Ill. 529; *Weber v. Anderson*, 73 Ill. 439; *Wadhams v. Innes*, 4 Ill. App. 642. **Indiana**: *Scheible v. Slagle*, 89 Ind. 323; *Hoot v. Spade*, 20 Ind. 326; *Wright v. Nipple*, 92 Ind. 310. **Iowa**: *Mischke v. Baughn*, 52 Iowa, 528; *Kostendamer v. Pierce*, 37 Iowa, 645, 41 Iowa, 204; *McDunn v. Des Moines*, 39 Iowa, 286. **Kentucky**: *Mercantile Trust Co. v. South Park Residence Co.* 94 Ky. 271, 22 S. W. Rep. 314; *Hunt v. Orwig*, 17 B. Mon. 73. **Maine**: *Blanchard v. Hoxie*, 34 Me. 376; *Blanchard v. Blanchard*, 48 Me. 174. **Massachusetts**: If there has been an eviction, the value of the land at the time of the eviction is the measure. *Boyle v. Edwards*, 114 Mass. 373; *Harlow v. Thomas*, 15 Pick. 66; *Lucas v. Wilcox*, 135 Mass. 77; *Cornell v. Jackson*, 3 Cush. 506; *Byrnes v. Rich*, 5 Gray, 518, per Shaw, C. J. **Michigan**: *Long v. Sinclair*, 40 Mich. 569. **New Hampshire**: *Winnipeg Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. Rep. 171; *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46; *Partridge v. Hatch*, 18 N. H. 494; *Parker v. Brown*, 15 N. H. 176. **New York**: *Hymes v. Esty*, 133 N. Y. 342, 347, 31 N. E. Rep. 105; *Hymes v. Van Cleef*, 15 N. Y. Supp. 341; *Hunt v.*

*Raplee*, 44 Hun, 149; *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254; *Guthrie v. Pugaley*, 12 Johns. 126; *Morris v. Phelps*, 5 Johns. 49, 4 Am. Dec. 323; *Furniss v. Ferguson*, 15 N. Y. 437. **North Carolina**: *Price v. Deal*, 90 N. C. 290. **Ohio**: *Nyce v. Obertz*, 17 Ohio, 71. **Oregon**: *Stark v. Olney*, 3 Oreg. 88. **Pennsylvania**: *Beaupland v. McKeen*, 28 Pa. St. 124. **Rhode Island**: *Porter v. Bradley*, 7 R. I. 538. **South Carolina**: *Aiken v. McDonald* (S. C.), 20 S. E. Rep. 796; *Hunt v. Nolen* (S. C.), 24 S. E. Rep. 310; *Earle v. Middleton*, Cheves, 127; *Wallace v. Talbot*, 1 McCord, 466; *Crawford v. Crawford*, 1 Bailey, 128; *Lewis v. Lewis*, 5 Rich. 12; *Jeter v. Glenn*, 9 Rich. 374. **Tennessee**: *Whitzman v. Hirsh*, 87 Tenn. 513; *Mette v. Dow*, 9 Lea, 93; *Moses v. Wallace*, 7 Lea, 413. **Texas**: *Kecsey v. Old*, 82 Tex. 22, 17 S. W. Rep. 928; *White v. Holley*, 3 Tex. Civ. App. 590, 24 S. W. Rep. 831; *Saunders v. Flaniken*, 77 Tex. 662, 14 S. W. Rep. 236; *Weeks v. Barton* (Tex. Civ. App.), 31 S. W. Rep. 1071; *Gass v. Sanger* (Tex. Civ. App.), 30 S. W. Rep. 502. **Vermont**: *Downer v. Smith*, 38 Vt. 464. **Virginia**: *Conrad v. Effinger*, 87 Va. 59, 12 S. E. Rep. 2; *Clarke v. Hardgrove*, 7 Gratt. 399; *Click v. Green*, 77 Va. 827, 835; *Threlkeld v. Fitzhugh*, 2 Leigh, 451. **West Virginia**: *Butcher v. Peterson*, 26 W. Va. 447. **Wisconsin**: *McLennan v. Prentice*,

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covenant be for seisin, against incumbrances, or for warranty, except in the States in which the rule prevails that in actions for a breach of the covenant of warranty the measure of damages is the value of the land at the time of eviction.

If the land is all of the same general character and quality, and there is failure of title to a part, as where the land is situated in an open prairie country, presumably, in the absence of proof to the contrary, the value of each acre is its *pro rata* part of the entire contract price.<sup>1</sup>

945. If separate prices were agreed upon for several tracts conveyed, on a breach of the covenant of seisin as to one tract the rule of damages is the sum paid for that tract.<sup>2</sup> If a distinct parcel of land was inserted with others by mistake, and nothing was paid for this parcel, and it was not considered by either party as included in the purchase, the damages for a breach of the covenant of seisin as to this parcel should be nominal only.<sup>3</sup> Parol evidence is not admissible to show such mistake, and the knowledge of the purchaser that such parcel belonged to another and was not intended or understood to be included in the conveyance, for such evidence cannot be received to vary or contradict a deed; but such evidence is admissible, on the question of damages, to show the consideration paid for the parcel for which a breach of the covenant of seisin is claimed, or to show that there was no consideration for such parcel.<sup>4</sup>

Where there is a failure of title as to one of several parcels of land of different values sold and conveyed by one deed, the values of the different parcels not having been determined by the parties, the measure of damages is the value of such parcel, to be ascertained by the relation of its value to the remainder of the land at the time of sale, assuming the price agreed upon by the parties as the value of the whole, with interest for such time as the purchaser has been deprived of, or is accountable for, the mesne profits.<sup>5</sup>

85 Wis. 427, 55 N. W. Rep. 764; *Messer v. Oestreich*, 52 Wis. 684, 696, 10 N. W. Rep. 6; *Semple v. Whorton*, 68 Wis. 626, 32 N. W. Rep. 690; *Larson v. Cook*, 85 Wis. 564, 55 N. W. Rep. 703.

<sup>1</sup> *Gass v. Sanger* (Tex. Civ. App.), 30 S. W. Rep. 502.

<sup>2</sup> *Harlow v. Thomas*, 15 Pick. 66, 70,

per Morton, J.; *Grant v. Hill* (Tex. Civ. App.), 30 S. W. Rep. 952.

<sup>3</sup> *Leland v. Stone*, 10 Mass. 459; *Barns v. Learned*, 5 N. H. 264.

<sup>4</sup> *Nutting v. Herbert*, 35 N. H. 120.

<sup>5</sup> *Griffin v. Reynolds*, 17 How. 609; *Grant v. Hill* (Tex. Civ. App.), 30 S. W. Rep. 952; *Raines v. Calhoun*, 27 Tex.

**946.** The damages for a breach of this covenant are limited to the actual damages sustained, and, if the grantee has taken and retained some interest under the deed, the value of this interest must be deducted from the purchase-price in any recovery for the breach.<sup>1</sup> It does not matter whether this interest be direct or indirect, or whether it accrues by force of the deed alone, or by its coöperation with other instruments or other circumstances, the value of it must be accounted for in estimating the damages.

**947.** The price of the land recoverable for a breach of this covenant is the price the grantor received. Therefore, in case the person to whom he has contracted to sell, instead of receiving a conveyance, contracts to sell to a third person, and the grantor at the request of his vendee conveys directly to such third person by deed with general covenant of seisin, the amount of recovery against the grantor for breach of such covenant is limited to the consideration received by him, with interest thereon.<sup>2</sup>

Where land is conveyed to a trustee, who pays nothing for it, and he afterwards in execution of his trust conveys, with covenants of warranty, to a third person, to whom his grantor has sold it, he thereby executes his grantor's contract, and the consideration which fixes the limit of his liability on his covenant is the price paid by the third person to his grantor.<sup>3</sup>

678; *Weeks v. Barton* (Tex. Civ. App.), 31 S. W. Rep. 1071; *White v. Holley*, 3 Tex. Civ. App. 590, 24 S. W. Rep. 831; *Gass v. Sanger* (Tex. Civ. App.), 30 S. W. Rep. 502; *Mann v. Matthews*, 82 Tex. 98, 17 S. W. Rep. 927; *Cornell v. Jackson*, 3 Cush. 506; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. Rep. 171; *Partridge v. Hatch*, 18 N. H. 494; *Furniss v. Ferguson*, 15 N. Y. 437; *Morris v. Phelps*, 5 Johns. 49; *Hymes v. Van Cleef*, 15 N. Y. Supp. 341; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115.

<sup>1</sup> *Hartford & S. Ore. Co. v. Miller*, 41 Conn. 112; *Baxter v. Bradbury*, 20 Me. 260, 264, 37 Am. Dec. 49; *King v. Gilson*, 32 Ill. 348; *Tone v. Wilson*, 81 Ill. 529; *Wise v. Hyatt*, 68 Miss. 714, 10 So. Rep. 37; *Downer v. Smith*, 38 Vt. 464; *Lawless v. Collier*, 19 Mo. 480; *Cochrell v.*

*Proctor*, 65 Mo. 41; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. Rep. 653; *Hencke v. Johnson*, 62 Iowa, 555, 17 N. W. Rep. 766; *Huntsman v. Hendricks*, 44 Minn. 423, 46 N. W. Rep. 910; *Kimball v. Bryant*, 25 Minn. 496; *Ogden v. Ball*, 38 Minn. 237, 36 N. W. Rep. 344.

In general, on the subject of damages for breaches of the several covenants, see the excellent treatises, *Sedgwick on Damages*, and *Sutherland on Damages*, as well as *Rawle on Covenants*, referred to in other parts of this chapter. It is possible here to state only the more general and important rules as to damages.

<sup>2</sup> *Bowne v. Wolcott*, 1 N. Dak. 497, 48 N. W. Rep. 426; *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. Rep. 464; *Byrnes v. Rich*, 5 Gray, 518.

<sup>3</sup> *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. Rep. 464.

948. For the purpose of ascertaining the damages, the true consideration may be shown by parol evidence in contradiction of the statement of the consideration contained in the deed.<sup>1</sup> Such evidence may have the effect of increasing the damages by showing that the actual consideration was greater than that expressed in the deed, or may have the effect of diminishing the damages by showing that the actual consideration was less than that expressed. The recital of the consideration paid is at most only *prima facie* evidence of the amount; it is open to explanation and contradiction, not to defeat the deed, but for the purpose of showing the true consideration. As to third persons, such recital is not even *prima facie* evidence of the consideration actually paid.<sup>2</sup>

If no consideration was actually paid by the grantee to the grantor, the measure of damages is the value of the land, with interest from the date of the deed.<sup>3</sup>

This and the following sections, relating to evidence as to the amount of the consideration actually paid, are applicable in determining the measure of damages for breaches of the covenants

<sup>1</sup> Patrick v. Leach, 1 McCrary, 250. **Mississippi**: Moore v. McKie, 5 Sm. & Connecticut: Belden v. Seymour, 8 Conn. M. 238. **Missouri**: Lambert v. Estes, 99 304, 21 Am. Dec. 661. **Georgia**: Martin Mo. 604, 608, 13 S. W. Rep. 284; Bobb v. Gordon, 24 Ga. 533; Fields v. Willing- v. Bobb, 89 Mo. 411, 4 S. W. Rep. 511; ham, 49 Ga. 344. **Illinois**: Howell v. Henderson v. Henderson, 13 Mo. 151; Moores, 127 Ill. 67, 19 N. E. Rep. 863. Bircher v. Watkins, 13 Mo. 521; Guinotte v. Indiana: Gavin v. Buckles, 41 Ind. 528. Chouteau, 34 Mo. 154. **New Hamp- Iowa**: Wachendorf v. Lancaster, 66 Iowa, shire: Nutting v. Herbert, 35 N. H. 120, 458, 23 N. W. Rep. 922; Williamson v. 37 N. H. 346; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419. **New York**: Bing- Test, 24 Iowa, 138; Hallam v. Todhunter, ham v. Weiderwax, 1 N. Y. 509; McCrea v. 24 Iowa, 166; Bloom v. Wolfe, 50 Iowa, 286; Blood v. Wilkins, 43 Iowa, 565. Purmort, 16 Wend. 460, 30 Am. Dec. 103. **Oregon**: Stark v. Olney, 3 Oreg. 88. **Kentucky**: Engleman v. Craig, 2 Bush, 424; Louisville, St. L. & T. Ry. Co. v. Pennsylvania: Cox v. Henry, 32 Pa. St. 18. **South Carolina**: Garrett v. Stuart, 1 Neafus (Ky.), 18 S. W. Rep. 1030. **Maine**: McCord, 514. **Tennessee**: Colcote v. El- Goodspeed v. Fuller, 46 Me. 141, 71 Am. kin (Tenn.), 15 S. W. Rep. 85; Perry v. Dec. 572; Cushing v. Rice, 46 Me. 303, Central So. R. Co. 5 Coldw. 138. **Wiscon- 71 Am. Dec. 579. Massachusetts**: Hodges sin: Semple v. Whorton, 68 Wis. 626, 637, v. Thayer, 110 Mass. 286; Byrnes v. Rich, 32 N. W. Rep. 690. 5 Gray, 518; Harlow v. Thomas, 15 Pick. <sup>2</sup> Allen v. Kennedy, 91 Mo. 324, 2 S. 66; Estabrook v. Smith, 6 Gray, 570, 578, W. Rep. 142. 66 Am. Dec. 443; Dexter v. Manley, 4 <sup>3</sup> Staples v. Dean, 114 Mass. 125; Cush. 14, 26; Smith v. Strong, 14 Pick. 128. Hodges v. Thayer, 110 Mass. 286; Byrnes v. Rich, 5 Gray, 518; Smith v. Strong. 14 **Michigan**: Cook v. Curtis, 68 Mich. 611, 36 N. W. Rep. 692. **Minnesota**: Devine v. Lewis, 38 Minn. 24, 35 N. W. Rep. 711. Pick. 128.

against incumbrances and of warranty, where the general rule of damages is the consideration paid.

**949.** If the consideration was not paid in money, but in goods, bonds, or other things not money, the value of the thing received is the measure of damages. Thus, in a suit against a railroad company for a breach of warranty in a conveyance of land, the company may show that the consideration was paid in unmatured bonds of the company, and that they were worth less than their face value.<sup>1</sup>

**950.** The rule that the measure of damages is the consideration paid applies, though the grantor did not receive the entire consideration. Thus, where the owner of land placed it with an agent for sale, with the agreement that the agent might retain as his commission whatever should be received for the land over a certain amount, and to facilitate the sale the owner conveyed the land to a trustee to convey to such persons as the agent might sell to, the deed containing a covenant of warranty, it was

<sup>1</sup> *Montgomery v. Northern Pac. Ry. Co.* 67 Fed. Rep. 445. *Bellinger, J.*, said: "I am of opinion that the fact of payment in bonds not yet due, or actually worth less than par, may be alleged as showing the damage sustained by reason of the failure of title complained of. It is argued that, since the obligation of the company is to pay these bonds at their face, the company will not be permitted to say that, when it took them in payment for land, it received less in money value than their par value. But if such bonds are not yet due, or are subject to the priority of bonds of another series, or are only a part of the bonds of one series, a recovery by plaintiff of damages to the amount of their par value has the effect to compel their payment before maturity, or in disregard of the rights of other lien-holders. If these bonds were at the time actually worth but ten per cent. of their face, it was upon the assumption that the assets of the company, if applied in payment of its obligations in the order in which such obligations were entitled to be discharged, would only pay that much. The debts of the company are the debts of its assets, beyond which, so far as creditors are concerned, there is no liability.

It follows that the bondholders of the company cannot compel the present payment in full of bonds not yet matured, or that are subsequent in order of payment, or that belong to a series for the full payment of which the assets of the company are inadequate. The officers of the company have no right to pay off a part of such bonds at their face, to the injury of the rights of other bondholders, and what they cannot do directly they cannot do indirectly. And yet this is what will happen if the plaintiff, having bought lands with these bonds, can now recover as damages their par value, with interest, upon the company's covenant of warranty of title. The plaintiff is entitled to compensation. It is only to this extent that damages are allowed, and the measure of his damages is the property which he exchanged for the land in question with its increment, or its value in money, with interest." Also see *Hodges v. Thayer*, 110 Mass. 286; *Cook v. Curtis*, 68 Mich. 611, 36 N. W. Rep. 692; *Byrnes v. Rich*, 5 Gray, 518; *Lacey v. Marnan*, 37 Ind. 168; *Williamson v. Test*, 24 Iowa, 138; *McGuffey v. Humes*, 85 Tenn. 26, 1 S. W. Rep. 506.

held that the warranty inured to the benefit of a purchaser, and the measure of damages was the amount paid and interest, notwithstanding a large part of this amount was retained by the agent as his commission.<sup>1</sup>

Such would be the amount of damages although no part of the money reached the hands of the warrantor.<sup>2</sup>

951. Parol evidence is admissible to show that no consideration was paid for a part of the land conveyed, to which there was no title, it having been included in the description by mistake.<sup>3</sup> Such evidence is admissible only on the question of damages. It could not be received to contradict or vary the deed by showing that such land was intended or understood to be included in the conveyance, for the purpose and with the result of negating any breach of the covenant. Evidence that no consideration was paid for a part of the land; that such part, though included in the deed, had already been conveyed to another; and that the parties knew and understood that such part was not to pass by the conveyance, — is admissible on the question of damages, and on that question only.<sup>4</sup>

952. Though the covenant of quiet enjoyment and the other usual covenants be joined with the covenant of seisin, the extent of the grantor's liability is the purchase-money, with interest.<sup>5</sup> Upon this point Chief Justice Kent said: "When the covenant for quiet enjoyment follows a covenant of seisin in the same deed, the intent of the instrument, taken together, appears manifestly to be, that the one covenant is merely auxiliary to the other, as the one covenant relates to the title, and the other refers to the future enjoyment of that title. The covenant for quiet enjoyment respects the possession merely, and it would seem to be unreasonable and very inconsistent for the plaintiff to recover under one covenant the whole value of the estate, as it was intended to be conveyed, and, under another covenant in the same

<sup>1</sup> *Rash v. Jenne*, 26 Oreg. 169, 37 Pac. Rep. 538.

<sup>2</sup> *Bloom v. Wolfe*, 50 Iowa, 286.

<sup>3</sup> *Leland v. Stone*, 10 Mass. 459; *Nutting v. Herbert*, 35 N. H. 120, 37 N. H. 346; *Barns v. Learned*, 5 N. H. 264; *Stewart v. Hadley*, 55 Mo. 235. And see *Weeks v. Barton* (Tex. Civ. App.), 31 S. W. Rep. 1071.

<sup>4</sup> *Nutting v. Herbert*, 35 N. H. 120, per Fowler, J.; *Spurr v. Andrew*, 6 Allen, 420; *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. Rep. 861; *Simanovich v. Wood*, 145 Mass. 180, 13 N. E. Rep. 391.

<sup>5</sup> *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320.

deed, distinct and increased damages, because he was not permitted to enjoy that estate. These covenants must be taken in connection to ascertain their import."<sup>1</sup>

A recovery of damages, though only nominal, as in case the grantee has not been disturbed in his possession, is a bar to a subsequent action on this covenant,<sup>2</sup> but not to an action on the covenants of warranty and for quiet enjoyment, upon a subsequent eviction for breaches of those covenants subsequently occurring.<sup>3</sup>

953. For a breach of the covenant which is technical merely, the grantee can recover nominal damages only. Thus, if the conveyance passed to the grantee the full equitable interest, with the possession of the land, which has remained undisturbed, and no hostile title has been asserted, the grantee having everything but the legal title, it is manifest that the grantee cannot recover the full purchase-money and at the same time retain the land. In the absence of a tender of a reconveyance the grantee is limited to a nominal recovery. Thus, where one makes a valid entry upon government land, and, before he receives a patent for the land, conveys the land by a deed in which he covenants that he is well seised in fee, his covenant is broken, because he is not seised of the legal title. He holds the full equitable and beneficial title, but the legal title remains in the United States till the patent actually issues. Until some paramount or hostile title is in some manner asserted, or the grantee is in some manner disturbed in his possession, such breach is a mere technical breach, for which the grantee can recover nominal damages only.<sup>4</sup>

If the covenantee has entered into possession, and he has never been disturbed in his possession, he can recover only nominal damages, although the title to the whole or some part of the land be in another.<sup>5</sup> The grantee may buy in the outstanding title,

<sup>1</sup> *Pitcher v. Livingston*, 4 Johns. 1, 18, 4 Am. Dec. 229. And see *Ogden v. Ball*, 40 Minn. 94, 99, 41 N. W. Rep. 453.

<sup>2</sup> *Donnell v. Thompson*, 10 Me. 170, 174, 25 Am. Dec. 216; *Nosler v. Hunt*, 18 Iowa, 212; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. Rep. 653; *Eaton v. Lyman*, 30 Wis. 41; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Noonan v. Hsley*, 22 Wis. 27.

<sup>3</sup> *Ogden v. Ball*, 40 Minn. 94, 41 N. W. Rep. 453.

<sup>4</sup> *Bowne v. Wolcott*, 1 N. Dak. 415, 48 N. W. Rep. 336; *O'Meara v. McDaniel*, 49 Kans. 685, 31 Pac. Rep. 303; *Lesly v. Bowie*, 27 S. C. 193, 3 S. E. Rep. 199; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68.

<sup>5</sup> *Sable v. Brockmeier*, 45 Minn. 248, 47 N. W. Rep. 794; *Ogden v. Ball*, 38 Minn. 237, 36 N. W. Rep. 344; *Cockrell v. Proctor*, 65 Mo. 41; *Axtel v. Chase*, 77 Ind. 74; *Boon v. McHenry*, 55 Iowa, 202, 7 N. W. Rep. 503; *Wilson v. Irish*, 52 Iowa,

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and in that case he is entitled to recover the amount he has reasonably paid for such title; but until he proves what he paid for such title he can recover only nominal damages.<sup>1</sup>

A grantee who has parted with his entire interest in the land can recover only nominal damages for a technical breach of the covenants of seisin and of right to convey. Stated more fully and completely, the rule is that, when personal covenants are connected with the sweeping covenant of warranty, and the covenant of seisin is broken, but the grantee has parted with the property, and has never been disturbed in his ownership, nor paid anything in purchasing in the paramount title, nor became liable to pay anything, he can at most recover only nominal damages from the grantor for the breach of the covenant of seisin.<sup>2</sup>

954. If the grantee in case of a technical breach of the covenant of seisin tenders a reconveyance, the proper rule of damages is the entire purchase-price, with interest.<sup>3</sup> A recovery of full damages against the grantor entitles him to a reconveyance. The grantee is estopped to claim the land as against the grantor.<sup>4</sup> If the legal seisin is transferred to the grantee before he has brought his action for a breach of the covenant, he cannot elect to reject the title and recover the purchase-money. He can only recover the damages he has actually sustained from interruption of possession or otherwise.<sup>5</sup>

955. The action for a breach of the covenant of seisin is not founded on any right to rescind the contract or deed, though rescission results from a recovery and satisfaction of judg-

260, 17 N. W. Rep. 211; *Norman v. Garfield v. Williams*, 2 Vt. 311, 327; *Winch*, 65 Iowa, 263, 21 N. W. Rep. 598; *Reese v. Smith*, 12 Mo. 344; *Wilson v. Wilson v. Forbes*, 2 Dev. 30; *Cowan v. Forbes*, 2 Dev. 30; *M'Carty v. Leggett*, 3 Hill, 134; *Colby v. Osgood*, 29 Barb. 339; *Boon v. McHenry*, 55 Iowa, 202, 7 N. W. Rep. 503.

<sup>1</sup> *Snell v. Iowa Homestead Co.* 59 Iowa, 701, 13 N. W. Rep. 848; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114.

<sup>2</sup> *Hammerslough v. Hackett*, 48 Kans. 700, 29 Pac. Rep. 1079, citing *Morrison v. Underwood*, 20 N. H. 369; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Kimball v. Bryant*, 25 Minn. 496; *Burke v. Beveridge*, 15 Minn. 205; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Brandt v. Foster*, 5 Iowa, 287; *Prescott v. Truman*, 4 Mass. 627, 3 Am. Dec. 249; *Middlebury College v. Cheney*, 1 Vt. 336;

<sup>3</sup> *Frazer v. Supervisors*, 74 Ill. 282; *Kincaid v. Brittain*, 5 Sneed, 119; *Recohs v. Younglove*, 8 Baxt. 385; *Bowne v. Wolcott*, 1 N. Dak. 415, 48 N. W. Rep. 336.

<sup>4</sup> *Parker v. Brown*, 15 N. H. 176.

<sup>5</sup> *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Knowles v. Kennedy*, 82 Pa. St. 445; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269.



ment, in equity if not at law.<sup>1</sup> An executed conveyance cannot be rescinded merely because of a breach of the covenant of seisin,<sup>2</sup> unless the vendor is insolvent, though it has been erroneously stated in some cases that if the grantee desires to rescind for want of title in the grantor, and to recover the consideration paid with interest, he may tender to the grantor a reconveyance and the possession, and then may maintain his action on the covenant.<sup>3</sup>

So long as the purchaser remains in quiet possession, he cannot sustain a bill for a rescission or abatement of price on the ground of an outstanding title, unless upon the score of fraud.<sup>4</sup>

An action to rescind a sale of land on the ground of fraud cannot be joined with an action on the covenants of seisin and right to convey contained in the deed thereof, since the former is a disaffirmance, while the latter is an affirmance, of the contract.<sup>5</sup>

An action for rescission may be maintained when the vendor has made material representations, as to his seisin and right to convey, which are false, and deceived the vendee and induced him to purchase.<sup>6</sup> It is in such case immaterial whether the representations were knowingly or ignorantly made.

956. Only nominal damages can be recovered against one who conveys with covenants of warranty if he acquires title before suit is brought.<sup>7</sup> The after-acquired title in such case

<sup>1</sup> Catlin v. Hurlburt, 3 Vt. 403; Benjamin v. Hobbs, 31 Ark. 151.

<sup>2</sup> McLennan v. Prentice, 85 Wis. 427, 55 N. W. Rep. 764; Booth v. Ryan, 31 Wis. 45, 58, per Dixon, C. J.; Smith v. Hughes, 50 Wis. 620, 7 N. W. Rep. 653; Clementson v. Streeter, 59 Wis. 429, 18 N. W. Rep. 340; Parker v. Parker, 93 Ala. 80, 9 So. Rep. 426; Strong v. Waddell, 56 Ala. 471; Lett v. Brown, 56 Ala. 550.

<sup>3</sup> Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68.

<sup>4</sup> Lessly v. Bowie, 27 S. C. 193, 3 S. E. Rep. 199; Childs v. Alexander, 22 S. C. 169, 185; Whitworth v. Stuckey, 1 Rich. Eq. 404.

<sup>5</sup> McLennan v. Prentice, 85 Wis. 427, 55 N. W. Rep. 764.

<sup>6</sup> Lindsey v. Veasy, 62 Ala. 421; Kelly v. Allen, 34 Ala. 663; Walton v. Bonham,

24 Ala. 513; Parker v. Parker, 93 Ala. 80, 9 So. Rep. 426.

<sup>7</sup> Sayre v. Sheffield Land Co. (Ala.) 18 So. Rep. 101; Reese v. Smith, 12 Mo. 344; Morrison v. Underwood, 20 N. H. 369; Farmers' Bank v. Glenn, 68 N. C. 35; Cornell v. Jackson, 3 Cush. 506; Knowles v. Kennedy, 82 Pa. St. 445; Reaser v. Carney, 52 Minn. 397, 54 N. W. Rep. 89; McLennan v. Prentice, 85 Wis. 427, 55 N. W. Rep. 764; McInnis v. Lyman, 62 Wis. 191, 22 N. W. Rep. 405; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49, the court saying: "The plaintiff, by taking a general covenant of warranty, not only assented to, but secured and made available to himself, all the legal consequences resulting from the covenant. Having therefore under his deed, before the commencement of the action, acquired the seisin which it was the object

inures to the benefit of the grantee. It is considered that, when the covenant is taken and the covenantee pays his money, he intends to acquire title to the land, and not to make a loan, and when he has obtained what he purchased he has sustained no injury. Technically there has been a breach of the covenant, for which the law gives a right of recovery, but having the title for which he contracted he can only recover nominal damages.<sup>1</sup>

#### VIII. *Measure of Damages on Covenants against Incumbrances.*

957. If the incumbrance is such as to wholly defeat the estate conveyed, the measure of damages is the consideration-money and interest thereon.<sup>2</sup> If the incumbrance is less in amount than the consideration paid for the land, and the grantee pays it to relieve his property, he is entitled to recover the amount paid with interest.<sup>3</sup>

Where one conveyed land, with a covenant to save the grantee harmless against a mortgage upon that and other land given by a former owner, and the mortgage was afterwards foreclosed upon all the mortgaged land, and the land was bought by the grantee, it was held, in an action by him on the covenant, that the measure of his damages was the price paid by him to his grantor, and that the fact that the land other than that conveyed by his grantor was worth more than the amount paid for the purchase under the mortgage could not be taken into account to reduce the damages.<sup>4</sup>

958. If the incumbrance is practically inextinguishable, as in case of a permanent easement, the measure of damages is the difference in the value of the land without and with the

of both covenants to secure, he could be entitled only to nominal damages."

<sup>1</sup> King v. Gilson, 32 Ill. 348, 356, 83 Am. Dec. 269, citing Cotton v. Ward, 3 T. B. Mon. 304; Reese v. Smith, 12 Mo. 344; Cornell v. Jackson, 3 Cush. 506; Morrison v. Underwood, 20 N. H. 369, followed and adopted in Sayre v. Sheffield Land Co. (Ala.) 18 So. Rep. 101.

<sup>2</sup> Hymes v. Esty, 133 N. Y. 342, 347, 31 N. E. Rep. 105; Dimmick v. Lockwood, 10 Wend. 142; Kelly v. Dutch Church, 2 Hill, 105; Hunt v. Raplee, 44 Hun, 149; Adams v. Conover, 22 Hun, 424; Chapel v. Bull, 17 Mass. 213;

Jenkins v. Hopkins, 8 Pick. 346; Blanchard v. Ellis, 1 Gray, 195; Dana v. Goodfellow, 51 Minn. 375, 53 N. W. Rep. 656; Nichol v. Alexander, 28 Wis. 118; Pearson v. Ford (Kans.), 42 Pac. Rep. 257; Foote v. Burnet, 10 Ohio, 317, 335, 36 Am. Dec. 90; Copeland v. McAdory, 100 Ala. 553, 560, 13 So. Rep. 545; Alexander v. Bridgford, 59 Ark. 195, 27 S. W. Rep. 69.

<sup>3</sup> Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Dimmick v. Lockwood, 10 Wend. 142.

<sup>4</sup> Dana v. Goodfellow, 51 Minn. 375, 53 N. W. Rep. 656.

incumbrance.<sup>1</sup> A restriction as to building lines, or as to the character or cost of the building to be erected upon the land, is for all practical purposes inextinguishable, for the purchaser cannot compel a release of it in any form, and therefore the measure of damages is the injury arising from the continuance of the incumbrance.

A similar rule of damages applies in case of a breach of a covenant to allow another to exercise a certain easement, as where a deed of a right of way to a railroad company having provided for a private way on the grantor's farm under the railroad, the company having violated the covenant, evidence of what his land was worth without the crossings, and what it would have been worth with them, is admissible.<sup>2</sup>

If the incumbrance is of a kind which interferes with the purchaser's enjoyment of the property, he is entitled to substantial damages, the measure of which is a just compensation for the injury resulting from the incumbrance.<sup>3</sup>

Interest cannot be recovered on damages arising from the breach of a covenant against incumbrances when the incumbrance is permanent in its nature; for in such case the measure of the damages is the difference of the value of the premises with and without the incumbrance, and is necessarily unliquidated.<sup>4</sup>

<sup>1</sup> *Copeland v. McAdory*, 100 Ala. 553, 560, 13 So. Rep. 545; *Clark v. Ziegler*, 79 Ala. 346, 85 Ala. 154; *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. Rep. 702; *Hubbard v. Norton*, 10 Conn. 422; *Mitchell v. Stanley*, 44 Conn. 312; *Fagan v. Cadmus*, 46 N. J. L. 441, 445; *Porter v. Bradley*, 7 R. I. 538; *Streep v. Abeln*, 59 Mo. App. 485; *Kellogg v. Malin*, 62 Mo. 429; *Walker v. Deaver*, 79 Mo. 664; *Henderson v. Henderson*, 13 Mo. 151; *Hymes v. Esty*, 133 N. Y. 342, 31 N. E. Rep. 105; *Huyck v. Andrews*, 113 N. Y. 81, 20 N. E. Rep. 581; *Delavergne v. Norris*, 7 Johns. 358; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. Rep. 671; *Bronson v. Coffin*, 108 Mass. 175; *Wetherbee v. Bennett*, 2 Allen, 428; *Harlow v. Thomas*, 15 Pick. 66; *Batchelder v. Sturgis*, 3 Cush. 201; *Prescott v. Trueman*, 4 Mass. 627, 630, 3 Am. Dec. 249.

<sup>2</sup> *Lake Erie & W. R. Co. v. Lee* (Ind), 41 N. E. Rep. 1058; *Louisville, New*

*Albany, &c. Ry. Co. v. Sparks*, 12 Ind. App. 410, 40 N. E. Rep. 546; *Louisville, New Albany, &c. Ry. Co. v. Sumner*, 106 Ind. 55, 5 N. E. Rep. 404.

<sup>3</sup> *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. Rep. 47; *Wetherbee v. Bennett*, 2 Allen, 428; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Harlow v. Thomas*, 15 Pick. 66; *Williamson v. Hall*, 62 Mo. 405; *Kellogg v. Malin*, 62 Mo. 429, 434; *Hubbard v. Norton*, 10 Conn. 422; *Funk v. Voneida*, 11 Serg. & R. 110, 14 Am. Dec. 617; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. Rep. 94; *Walker v. Wilson*, 13 Wis. 522; *Guthrie v. Pugsley*, 12 Johns. 126; *Brown v. Allen*, 73 Hun, 291, 26 N. Y. Supp. 299.

See, however, *Black v. Coan*, 48 Ind. 385; *Rosenberger v. Keller*, 33 Gratt. 489; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. Rep. 94.

<sup>4</sup> *Doctor v. Darling*, 22 N. Y. Supp. 594, 596, per Follett, J.

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**959.** The measure of damages for the incumbrance of an unexpired term of lease is the fair rental value of the property to the expiration of the term. "The underlying principle is that the damages should be estimated according to the real injury arising from the existence of the incumbrance, which, in the case supposed, is presumably and ordinarily the value of the use of the premises for the time during which the vendee has been deprived of such use."<sup>1</sup>

The purchaser may, if he prefers, recognize the lease to the tenant and accept the unpaid rent; and in that case he could not recover damages for the incumbrance. But he is not obliged to recognize the lease, and he is not obliged to receive the unpaid rent in satisfaction of his damages for the incumbrance. He is entitled to the immediate possession of the land, and, being deprived of such possession by reason of the existence of the lease, he is entitled to all his damages for the injury.<sup>2</sup>

If the breach of the covenant consists in the possession of the land by a tenant of the grantor, who offers to attorn to the purchaser, and, not being recognized by the purchaser, pays the rent to the grantor, the purchaser is entitled to damages to the full rental value for the time he is kept out of possession, without deduction of the rents turned over to the grantor.<sup>3</sup>

If there is a crop upon the leased land at the time of the delivery of the deed which the lessee is authorized to remove, the measure of damages may be increased to the extent of the value of the crop, less the expense of taking care of and harvesting the same.<sup>4</sup>

Where the incumbrance is a right granted to a stranger to cut timber on the land for a term of years, the measure of damages is the value of the timber to the purchaser of the land for the use

<sup>1</sup> *Fritz v. Pusey*, 31 Minn. 368, 370, 18 N. W. Rep. 94, per Mitchell, J.; *Clark v. Fisher*, 54 Kans. 403, 38 Pac. Rep. 493; *Porter v. Bradley*, 7 R. I. 538, 542.

<sup>2</sup> *Clark v. Fisher*, 54 Kans. 403, 38 Pac. Rep. 493, per Horton, C. J.; *Smith v. Leighton*, 38 Kans. 544, 17 Pac. Rep. 52.

<sup>3</sup> *Edwards v. Clark*, 83 Mich. 246, 47 N. W. Rep. 112.

<sup>4</sup> *Clark v. Fisher*, 54 Kans. 403, 38

Pac. Rep. 493. "If the defendants had given to the plaintiff the immediate possession of the premises at the time of the delivery of the deed, as they covenanted therein, he would have had the exclusive possession thereof, with all the crops growing thereon." Per Horton, C. J., citing *Chapman v. Veach*, 32 Kans. 167, 4 Pac. Rep. 100; *Robinson v. Hall*, 33 Kans. 139, 5 Pac. Rep. 763.

of his farm, estimated at the time of the conveyance to him, and not the value of the timber to the purchaser of that.<sup>1</sup>

If the incumbrance is a lease of the coal in the granted land, but the coal remains in its natural state, and the covenantor tenders a release from the lessee, the damages are merely nominal.<sup>2</sup>

Where the incumbrance consists of a right, under a lease which does not expire for some years, to procure ice from the premises, and a right of way across the land for such purpose, the plaintiff may, upon proper and sufficient proof, recover substantial damages, although he has paid nothing to extinguish the incumbrance, nor been disturbed in his possession.<sup>3</sup>

960. Only nominal damages can be recovered in case the incumbrance is an inchoate right of dower; because of the contingent nature of this incumbrance, it is not susceptible of computation until the right becomes consummate.<sup>4</sup> If the dower right has become fixed, the measure of damages is determined according to the expectation of life of the tenant in dower, on the basis of the consideration paid to the covenantor for the land.<sup>5</sup>

961. The damages must be proximate and not remote. Thus, where one who was the actual owner of a farm and in possession of it sold it with covenants of warranty subject to a mortgage, but, by reason of the loss of a deed in the grantor's chain of title before it was recorded, the grantee was unable to obtain a loan upon the farm, and in consequence the mortgage was foreclosed and the grantee evicted, the defect in the title not having been made good in season to prevent the eviction, though it was afterwards remedied, it was held that the grantee could not recover damages for the loss of the farm.<sup>6</sup>

Where the breach consists of an alleged encroachment of the buildings on the adjoining land of another, evidence that the covenantee had made a contract to sell the premises, and that the

<sup>1</sup> Cathcart v. Bowman, 5 Pa. St. 317; Clark v. Zeigler, 85 Ala. 154, 4 So. Rep. 669.

<sup>2</sup> Buren v. Hubbell, 54 Mo. App. 617.

<sup>3</sup> Smith v. Davis, 44 Kans. 362, 24 Pac. Rep. 428.

<sup>4</sup> Blevins v. Smith, 104 Mo. 583, 16 S. W. Rep. 213; Walker v. Deaver, 79 Mo. 664.

<sup>5</sup> Terry v. Drabenstadt, 68 Pa. St. 400; Tierney v. Whiting, 2 Colo. 620; Western v. Short, 12 B. Mon. 153; Wager v. Schuyler, 1 Wend. 553; Guthrie v. Pugsley, 12 Johns. 126; Downie v. Ladd, 22 Neb. 531, 35 N. W. Rep. 388; Mills v. Carlin, 22 Vt. 98.

<sup>6</sup> Lamb v. Buker, 34 Neb. 485, 52 N. W. Rep. 285.

purchaser refused to accept on account of such encroachment, is not admissible, as his damages, if anything, are the difference in value between the building with and without the encroachment.<sup>1</sup>

962. If the plaintiff has paid off the incumbrance at any time before the trial, he may recover what he has fairly and reasonably paid for that purpose, not exceeding the value of the estate.<sup>2</sup> The burden is upon the plaintiff to show that the sum he has paid to extinguish an incumbrance was fairly and necessarily paid.<sup>3</sup> If the incumbrance is an assessment for a street

<sup>1</sup> *Stearn v. Hesdorfer*, 9 Misc. Rep. 134, 29 N. Y. Supp. 281.

<sup>2</sup> *Arkansas*: *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702. *California*: Civ. Code, § 3305; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456. *Connecticut*: *Beecher v. Baldwin*, 55 Conn. 419, 12 Atl. Rep. 401; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Davis v. Lyman*, 6 Conn. 249. *Georgia*: *Amos v. Cosby*, 74 Ga. 793. *Illinois*: *Wadhams v. Swan*, 109 Ill. 46; *Cheney v. City National Bank*, 77 Ill. 562; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Willets v. Burgess*, 34 Ill. 494. *Indiana*: *Worley v. Hineman* (Ind. App.), 33 N. E. Rep. 260; *Burk v. Clements*, 16 Ind. 132; *Snyder v. Lane*, 10 Ind. 424; *Rardin v. Walpole*, 38 Ind. 146. *Iowa*: *Harwood v. Lee*, 85 Iowa, 622, 52 N. W. Rep. 521; *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135; *Baker v. Corbett*, 28 Iowa, 317. *Maine*: *Runnells v. Webber*, 59 Me. 488; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Stoddard v. Gage*, 41 Me. 287; *Herrick v. Moore*, 19 Me. 313. *Massachusetts*: *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. Rep. 47; *Coburn v. Litchfield*, 132 Mass. 449; *Smith v. Carney*, 127 Mass. 179, 182; *Johnson v. Collins*, 116 Mass. 392; *Harrington v. Murphy*, 109 Mass. 299; *Farnum v. Peterson*, 111 Mass. 148; *Norton v. Babcock*, 2 Met. 510; *Comings v. Little*, 24 Pick. 266; *Harlow v. Thomas*, 15 Pick. 66; *Leffingwell v. Elliott*, 10 Pick. 204; *Batchelder v. Sturgis*, 3 Cush. 201; *Brooks v. Moody*, 20 Pick. 474; *Tufts v. Adams*, 8

*Pick*. 547; *Chapel v. Bull*, 17 Mass. 213. *Missouri*: *Edington v. Nix*, 49 Mo. 134; *St. Louis v. Bissell*, 46 Mo. 157; *Henderson v. Henderson*, 13 Mo. 151; *Ward v. Ashbrook*, 78 Mo. 515; *Williamson v. Hall*, 62 Mo. 405; *Morgan v. Hannibal & St. Jo. R. Co.* 63 Mo. 129; *Walker v. Deaver*, 79 Mo. 664; *Barnhart v. Hughes*, 46 Mo. App. 318. *Nebraska*: *Mills v. Saunders*, 4 Neb. 190. *New Hampshire*: *Smith v. Jefts*, 44 N. H. 482; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Morrison v. Underwood*, 20 N. H. 369; *Osgood v. Osgood*, 39 N. H. 209. *New Jersey*: *Fagan v. Cadmus*, 46 N. J. L. 441; *Hartshorn v. Cleveland*, 52 N. J. L. 473, 19 Atl. Rep. 974; *Stewart v. Drake*, 9 N. J. L. 139; *Garrison v. Sandford*, 12 N. J. L. 261. *New York*: *Braman v. Bingham*, 26 N. Y. 483; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281; *Stanard v. Eldridge*, 16 Johns. 254; *Hall v. Dean*, 13 Johns. 105; *North Carolina*: *Lane v. Richardson*, 104 N. C. 642, 10 S. E. Rep. 189. *North Dakota*: R. Codes 1895, § 4982. *Ohio*: *Stambaugh v. Smith*, 23 Ohio St. 584; *Foote v. Burnet*, 10 Ohio, 317, 36 Am. Dec. 90. *Oregon*: *Corbett v. Wrenn*, 25 Oreg. 305, 35 Pac. Rep. 658. *Pennsylvania*: *Funk v. Voneida*, 11 S. & R. 110, 112, 14 Am. Dec. 617. *South Dakota*: Comp. Laws 1887, § 4585. *Vermont*: *Richardson v. Dorr*, 5 Vt. 9. *Wisconsin*: *Eaton v. Tallmadge*, 22 Wis. 526; *Pillsbury v. Mitchell*, 5 Wis. 17; *Eaton v. Lyman*, 30 Wis. 41.

<sup>3</sup> *Gilbert v. Rushmer*, 49 Kans. 632, 31

improvement, which became an incumbrance from the time of the completion of the improvement, and the purchaser shows that the sum paid by him was reasonably necessary to discharge the incumbrance, his recovery of such sum will not be affected by the fact that an assessment for the improvement, levied after the making of the covenant, and still existing at the time of payment, is invalid for non-compliance with the provisions in regard to levying such assessment. The right of the city to have the amount determined, and to collect it from the property, remained; and, whether the determination was finally made by the existing assessment or by another to be substituted for it, the lien would continue from the time of the completion of the improvement. The avoidance of the assessment would merely cast upon the plaintiff the burden of showing *aliunde* that the sum paid by him was reasonably necessary to discharge the property from its liability for a just and legal share of the expense of the improvement.<sup>1</sup>

**963.** If the grantee is compelled to buy off a claim of a right of way to which the land was subject, and the price paid is reasonable, he may recover it in an action on the covenant against incumbrances.<sup>2</sup>

If an easement, such as a right of way of a railroad, or of a public highway, when considered with reference to the entire parcel conveyed, enhances rather than diminishes its value, the grantee is entitled only to nominal damages as for a technical breach of the covenant.<sup>3</sup>

**964.** To recover more than nominal damages, the burden is on the grantee to show the fair and reasonable value of the incumbrance paid by him. He is not entitled to recover in an action upon the covenant what he actually paid to extinguish the incumbrance, unless he shows that the sum so paid was the fair and reasonable value of the incumbrance.<sup>4</sup> Evidence given by the person who held the incumbrance, that the price paid to him to extinguish it was the least sum that he would take for his

Pac. Rep. 123; *Anderson v. Knox*, 20 Ala. 156; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135; *Lawless v. Collier*, 19 Mo. 480; *Walker v. Deaver*, 5 Mo. App. 139.

<sup>1</sup> *Hartshorn v. Cleveland*, 52 N. J. L. 473, 19 Atl. Rep. 974.

<sup>2</sup> *Richmond v. Ames*, 164 Mass. 467, 41 N. E. Rep. 671; *Harlow v. Thomas*, 15 Pick. 66, 69.

<sup>3</sup> *Wadhams v. Swan*, 109 Ill. 46.

<sup>4</sup> *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114.

DAMAGES ON COVENANTS AGAINST INCUMBRANCES. [§§ 965, 966.

interest, is not sufficient without other evidence to establish the reasonableness of such payment.<sup>1</sup>

One who buys land by a deed containing a covenant against incumbrances may discharge a mortgage which incumbered the land at the time of the purchase, and, though he knew of the mortgage, which was to a building association, and agreed to pay a certain sum towards the discharge of it, he may recover upon his covenant the sum paid for the discharge of it in excess of the sum he agreed to pay for that purpose. The grantor, for the purpose of mitigating the damages for breach of the covenant, may show that the purchaser agreed to pay a part of the incumbrance, but he cannot negative the covenant by showing that, if the purchaser had waited till the maturity of the mortgage, the sum he agreed to pay upon it would have been sufficient to extinguish it, instead of the much larger sum required for its extinguishment at the time the purchaser discharged it.<sup>2</sup>

965. An action for a breach of the covenant against incumbrances cannot be maintained by a covenantee who has taken an assignment of the mortgage which constitutes the incumbrance. If he were allowed to do so, an evil-disposed grantee might buy in an incumbrance before maturity, hold it unsatisfied, and recover for a breach of the covenant of his deed, and then dispose of the mortgage to one purchasing in good faith without notice before maturity, and for valuable consideration, and thus be twice paid for the incumbrance.<sup>3</sup> Accordingly, a purchaser, who buys in and holds as assignee a prior mortgage covering the land purchased and other land, cannot recover therefor in an action for breach of his vendor's covenant against incumbrances until he has exhausted his remedy on such mortgage by foreclosure or otherwise.<sup>4</sup>

966. An incumbrance that is invalid is not within the covenant against incumbrances, though it is upon record, as, for instance, an invalid tax deed. If the purchaser expends money in removing the apparent incumbrance, he cannot recover even nominal damages in an action upon such covenant.<sup>5</sup>

<sup>1</sup> Gilbert v. Rushmer, 49 Kans. 632, 31 Pac. Rep. 123.

<sup>2</sup> Corbett v. Wrenn, 25 Oreg. 305, 35 Pac. Rep. 658.

<sup>3</sup> Harwood v. Lee, 85 Iowa, 622, 52 N. W. Rep. 521.

<sup>4</sup> Harwood v. Lee, 85 Iowa, 622, 52 N. W. Rep. 521.

<sup>5</sup> Tibbetts v. Leeson, 148 Mass. 102, 18 N. E. Rep. 679.



In Massachusetts it is now provided by statute that when real estate is conveyed by deed or mortgage containing a covenant against incumbrances, and an incumbrance appears of record to exist thereon, whether known or unknown to the grantor, he is liable in an action to the grantee, his heirs, executor, administrator, or assigns, for all damages sustained in removing the same.<sup>1</sup> This statute was not intended to declare that to be an incumbrance which was not so according to legal definition, but, in view of the embarrassment arising from titles appearing by the record yet having no actual existence in fact, to afford a remedy to the grantee by enabling him to remove the incumbrance and recover the damages sustained.<sup>2</sup>

Where, after bringing an action for a breach of covenant for removing an invalid incumbrance, a new cause of action accrued under this statute, it was held that the action could not be sustained under the statute, because the right of action did not exist at the time it was brought.<sup>3</sup> If the invalid incumbrance is an assessment for improvements which may be validated by a re-assessment, the purchaser may remove the incumbrance without waiting for a re-assessment, and recover upon his covenant the amount reasonably paid, with his reasonable expenses.<sup>4</sup>

If a purchaser, without notice to his grantor, pays a tax, which is an apparent lien on the land, voluntarily and without an adjudication as to its validity, and without having been disturbed in his quiet and peaceable possession, in a suit against the grantor on his covenant against incumbrances, the grantor may show that the tax was invalid, and may thus defeat a recovery.<sup>5</sup>

**967. Only nominal damages can be recovered for the existence of an incumbrance until it is paid, if there has been no attempt to enforce the incumbrance.**<sup>6</sup>

<sup>1</sup> Pub. Stats. ch. 126, § 18.

<sup>2</sup> *Tibbetts v. Leeson*, 148 Mass. 102, 18 N. E. Rep. 679. A similar statute in Minnesota is given a like construction. *Hawthorne v. City Bank*, 34 Minn. 382, 26 N. W. Rep. 4.

<sup>3</sup> *Tibbetts v. Leeson*, 148 Mass. 102, 18 N. E. Rep. 679.

<sup>4</sup> *Coburn v. Litchfield*, 132 Mass. 449.

<sup>5</sup> *Balfour v. Whitman*, 89 Mich. 202, 50 N. W. Rep. 744.

<sup>6</sup> *Connecticut: Beecher v. Baldwin*, 55

Conn. 419; *Briggs v. Morse*, 42 Conn. 258; *Davis v. Lyman*, 6 Conn. 249. Illinois: *Cheney v. City Nat. Bank*, 77 Ill. 562; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Willeys v. Burgess*, 34 Ill. 494. Indiana: *Marsh v. Thompson*, 102 Ind. 272; *Whisler v. Hicks*, 7 Blackf. 100, 102, 33 Am. Dec. 402; *Black v. Coan*, 48 Ind. 385. Iowa: *Yancey v. Tatlock (Iowa)*, 61 N. W. Rep. 997; *Funk v. Creswell*, 5 Iowa, 62; *Brandt v. Foster*, 5 Iowa, 287; *Royer v. Foster*, 62 Iowa, 321, 17 N. W.

The covenant against incumbrances is strictly one of indemnity, and if the grantee extinguishes the incumbrance he can recover only the sum he has paid to extinguish it.<sup>1</sup> If the incumbrance is a mortgage or lien which can be discharged by the payment of money, and which does not interfere with the enjoyment of the property by the grantee, the law gives only nominal damages if the grantee has done nothing towards the removal of the incumbrance.<sup>2</sup> The reason of the rule is, that the grantee may never be disturbed by the incumbrance. The debtor whose debt the incumbrance is may pay it. If the grantee in the case of an outstanding mortgage could recover the amount of the mortgage from his grantor before paying it, the holder of the

Rep. 516; *Sac County Bank v. Hooper*, 77 Iowa, 435, 42 N. W. Rep. 363; *Harwood v. Lee*, 85 Iowa, 622, 52 N. W. Rep. 521. **Maine**: *Runnells v. Webber*, 59 Me. 488; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Clark v. Perry*, 30 Me. 148; *Herrick v. Moore*, 19 Me. 313. **Massachusetts**: *Johnson v. Collins*, 116 Mass. 392; *Bradshaw v. Crosby*, 151 Mass. 235, 24 N. E. Rep. 47; *Harrington v. Murphy*, 109 Mass. 299; *Harlow v. Thomas*, 15 Pick. 66; *Tufts v. Adams*, 8 Pick. 547; *Batchelder v. Sturgis*, 3 Cush. 201; *Clark v. Swift*, 3 Met. 390; *Brooks v. Moody*, 20 Pick. 474; *Thayer v. Clemence*, 22 Pick. 490; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249. **Michigan**: *Norton v. Colgrove*, 41 Mich. 544, 3 N. W. Rep. 159. **Missouri**: *St. Louis v. Bissell*, 46 Mo. 157; *Edington v. Nix*, 49 Mo. 134. **Nebraska**: *Mills v. Saunders*, 4 Neb. 190. **New Hampshire**: *Smith v. Jefts*, 44 N. H. 482; *Osgood v. Osgood*, 39 N. H. 209; *Andrews v. Davison*, 17 N. H. 413, 43 Am. Dec. 606; *Morrison v. Underwood*, 20 N. H. 369. **New Jersey**: *Garrison v. Sanford*, 12 N. J. L. 261; *Stewart v. Drake*, 9 N. J. L. 139. **New York**: *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281; *Kent v. Welch*, 7 Johns. 258, 5 Am. Dec. 266; *Hall v. Dean*, 13 Johns. 105; *De Forest v. Leste*, 16 Johns. 122; *Stanard v. Eldridge*, 16 Johns. 254; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Barlow v. St. Nicholas Nat. Bank*, 63 N.

Y. 399, 20 Am. Rep. 547; *Soule v. Dixon*, 1 N. Y. Supp. 697; *McGuckin v. Milbank*, 83 Hun, 473, 31 N. Y. Supp. 1049; *Braman v. Bingham*, 26 N. Y. 483; *Stearn v. Hesdorfer*, 9 Misc. Rep. 134, 29 N. Y. Supp. 281. **North Carolina**: *Lane v. Richardson*, 104 N. C. 642, 10 S. E. Rep. 189. **Ohio**: *Foote v. Burnet*, 10 Ohio, 317, 36 Am. Dec. 90; *Stambaugh v. Smith*, 23 Ohio St. 584. **Pennsylvania**: *Funk v. Voneida*, 11 S. & R. 110, 14 Am. Dec. 617. **South Carolina**: *Lesly v. Bowie*, 27 S. C. 193, 3 S. E. Rep. 199; *McCrady v. Brisbane*, 1 Nott & McC. 104. **Vermont**: *Richardson v. Dorr*, 5 Vt. 9. **Wisconsin**: *Eaton v. Lyman*, 30 Wis. 41; *Pillsbury v. Mitchell*, 5 Wis. 17.

<sup>1</sup> *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169.

<sup>2</sup> *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. Rep. 47; *Batchelder v. Sturgis*, 3 Cush. 201; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249; *Clark v. Swift*, 3 Metc. 390; *Harlow v. Thomas*, 15 Pick. 66; *Tufts v. Adams*, 8 Pick. 547; *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Johnson v. Collins*, 116 Mass. 392; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Eaton v. Lyman*, 30 Wis. 41; *Foote v. Burnet*, 10 Ohio, 317, 36 Am. Dec. 90; *Lane v. Richardson*, 104 N. C. 642, 10 S. E. Rep. 189; *Lesly v. Bowie*, 27 S. C. 193, 3 S. E. Rep. 199; *Dimmick v. Lockwood*, 10 Wend. 142.

mortgage is not thereby paid, and he has no claim upon the grantee for the amount, but he may still resort to the grantor, if he is the mortgagor, and compel him to pay it again.<sup>1</sup>

*IX. Measure of Damages on Covenants of Warranty.*

968. The measure of damages generally adopted for a breach of the covenants of quiet enjoyment and warranty, in a suit by the grantee against the grantor, is the value of the land at the time of the conveyance, which is the consideration agreed upon by the parties, with interest and costs.<sup>2</sup> This rule, of course,

<sup>1</sup> Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169.

<sup>2</sup> Hopkins v. Lee, 6 Wheat. 109; Patrick v. Leach, 1 McCrary, 250. **Alabama**: Kingsbury v. Milner, 69 Ala. 502. **Arkansas**: Barnett v. Hughey, 54 Ark. 195, 15 S. W. Rep. 464; Carville v. Jacks, 43 Ark. 439; Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338. **California**: McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456. **Colorado**: Taylor v. Wallace, 20 Colo. 211, 37 Pac. Rep. 963. **Georgia**: Davis v. Smith, 5 Ga. 274, 285, 47 Am. Dec. 279; Martin v. Gordon, 24 Ga. 533. **Illinois**: Harding v. Larkin, 41 Ill. 413. **Indiana**: McClure v. McClure, 65 Ind. 482; Rhea v. Swain, 122 Ind. 272; Reese v. McQuilkin, 7 Ind. 450; Thomas v. Hamilton, 71 Ind. 277; Wood v. Bibbins, 58 Ind. 392; Phillips v. Reichart, 17 Ind. 120; Burton v. Reeds, 20 Ind. 87. **Iowa**: Bellows v. Litchfield, 83 Iowa, 36, 48 N. W. Rep. 1062; Wilhelm v. Fimple, 31 Iowa, 137, 7 Am. Rep. 117; Fawcett v. Woods, 5 Iowa, 400; Williamson v. Test, 24 Iowa, 138. **Kansas**: Stebbins v. Wolf, 33 Kans. 765, 7 Pac. Rep. 542. **Kentucky**: Graham v. Dyer (Ky.), 29 S. W. Rep. 346; Pence v. Duvall, 9 B. Mon. 48; Cox v. Strode, 2 Bibb, 273; Robertson v. Lemon, 2 Bush, 301. **Louisiana**: Boyer v. Amet, 41 La. Ann. 721, 6 So. Rep. 734. Improvements may be included. Coleman v. Ballard, 13 La. Ann. 512; Hale v. New Orleans, 13 La. Ann. 499. **Maryland**: Crisfield v. Storr, 36 Md. 129, 150, 11 Am. Rep. 480. **Michigan**: Cook v. Curtis, 68 Mich. 611,

36 N. W. Rep. 692. **Minnesota**: Devine v. Lewis, 38 Minn. 24, 35 N. W. Rep. 711; Moore v. Frankenfield, 25 Minn. 540. **Mississippi**: Phipps v. Tarpley, 31 Miss. 433; Brooks v. Black, 68 Miss. 161, 8 So. Rep. 332; White v. Presly, 54 Miss. 313. **Missouri**: Matheny v. Stewart, 108 Mo. 73, 17 S. W. Rep. 1014; Dickson v. Desire, 23 Mo. 151; Reese v. Smith, 12 Mo. 344; Hutchins v. Roundtree, 77 Mo. 500; Dryden v. Kellogg, 2 Mo. App. 87; Lambert v. Estes, 99 Mo. 604, 13 S. W. Rep. 284. **Montana**: Taylor v. Holter, 1 Mont. 688. **Nevada**: Hoffman v. Bosch, 18 Nev. 360, 4 Pac. Rep. 703; Dalton v. Bowker, 8 Nev. 190. **New Hampshire**: Winnipiseogee Paper Co. v. Eaton, 65 N. H. 13, 18 Atl. Rep. 171; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309; Foster v. Thompson, 41 N. H. 373; Nutting v. Herbert, 35 N. H. 120; Moody v. Leavitt, 2 N. H. 171; Bedel v. Loomis, 11 N. H. 9, 19. See earlier cases. **New Jersey**: Morris v. Rowan, 17 N. J. L. 304; Stewart v. Drake, 9 N. J. L. 139; Holmes v. Sinnickson, 15 N. J. L. 313. **New York**: Staats v. Ten Eyck, 3 Caines, 111, 2 Am. Dec. 254; Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Bennet v. Jenkins, 13 Johns. 50; Jenks v. Quinn, 137 N. Y. 223, 33 N. W. Rep. 376, 61 Hun. 427, 41 N. Y. St. Rep. 22, 16 N. Y. Supp. 240; Petrie v. Folz, 22 J. & S. 223, 10 N. Y. St. Rep. 451; Peters v. McKeon, 4 Denio, 546; Kelly v. Dutch Church, 2 Hill, 105. **North Car-**

excludes any compensation for the appreciation of the value of the land through improvements made by the grantee. For this reason, and as well because it excludes the grantee from the benefits which he would seem to be entitled to from a good bargain, or from a rise in the market value of the land, the rule has often been spoken of in the courts where it is adopted, as arbitrary and unjust.<sup>1</sup> It was adopted from the warranty of the ancient English law which gave to an evicted feoffee no personal action, but a right to recover from his feoffor other lands equal in value to those from which he had been evicted. "As the value of land was not measured in money, so there was no fluctuation in the market, and purchasers did not acquire title with the intention of subsequently conveying to a new purchaser at a profit. Even when the next step was taken, and the ordinary purchase and sale of lands began to become common, the idea of fluctuation in value was not thought of, and the consideration named in the deed began to be regarded as a pecuniary equivalent for the old agreement to enfeoff of lands of equal value.

**olina** : *West v. West*, 76 N. C. 45; *Williams v. Beeman*, 2 Dev. 483; *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. Rep. 638. **Ohio** : *Wade v. Comstock*, 11 Ohio St. 71; *Lloyd v. Quimby*, 5 Ohio St. 262; *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Foote v. Burnett*, 10 Ohio, 317, 36 Am. Dec. 90; *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777; *Dustin v. Newcomer*, 8 Ohio, 49. **Oregon** : *Rash v. Jenne*, 26 Oreg. 169, 37 Pac. Rep. 538; *Stark v. Olney*, 3 Oreg. 88. **Pennsylvania** : *Cox v. Henry*, 32 Pa. St. 18; *Hertzog v. Hertzog*, 34 Pa. St. 418; *McClure v. Gamble*, 27 Pa. St. 288; *Brown v. Dickerson*, 12 Pa. St. 372; *Cathcart v. Bowman*, 5 Pa. St. 317; *King v. Pyle*, 8 S. & R. 166; *McCafferty v. Griswold*, 99 Pa. St. 270; *Allison v. Montgomery*, 107 Pa. St. 455. **South Carolina** : Act 1824, § 4, p. 24; *Lowrance v. Robertson*, 10 S. C. 8; *Furman v. Elmore*, 2 Nott. & McC. 189; *Bond v. Quatilebaum*, 1 McCord, 584; *Aiken v. McDonald*, 43 S. C. 29, 20 S. E. Rep. 796; *Earle v. Middleton*, Cheves, 127; *Henning v. Withers*, 3 Brev. 458, 6 Am. Dec. 589. Early cases adopted the oppo-

site rule. **Tennessee** : *McGuffey v. Humes*, 85 Tenn. 26; *Shaw v. Wilkins*, 8 Humph. 647, 49 Am. Dec. 692; *Mette v. Dow*, 9 Lea, 93; *Elliott v. Thompson*, 4 Humph. 99, 40 Am. Dec. 630. **Texas** : *Thiele v. Axell*, 5 Tex. Civ. App. 548, 24 S. W. Rep. 803; *Rogers v. Golson* (Tex. Civ. App.), 31 S. W. Rep. 200; *Simpson v. Belvin*, 37 Tex. 674; *Glenn v. Mathews*, 44 Tex. 400; *Turner v. Miller*, 42 Tex. 418, 19 Am. Rep. 47. **Virginia** : *Sheffey v. Gardiner*, 79 Va. 313; *Click v. Green*, 77 Va. 827; *Haffey v. Birchetts*, 11 Leigh, 83; *Threlkeld v. Fitzhugh*, 2 Leigh, 451, 463. Early cases adopted the New England rule. **West Virginia** : *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246. **Wisconsin** : *Conrad v. Trustees*, 64 Wis. 258, 25 N. W. Rep. 24; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. Rep. 6; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. Rep. 405; *Lawton v. Howe*, 14 Wis. 241; *Hall v. De Laplaine*, 5 Wis. 206, 68 Am. Dec. 57.

<sup>1</sup> *Hymes v. Esty*, 133 N. Y. 342, 347, 31 N. E. Rep. 105.

Instead of getting land of equal value, the plaintiff was to get what both parties had by consent substituted for it,—the consideration. So strongly fixed was the old idea, that it was not perceived until at a comparatively recent date that to take the consideration as an arbitrary limit violates all the general rules governing the measure of damages upon breaches of contract applicable in such a case.”<sup>1</sup>

Under this rule of damages, it is no defence that the land conveyed was not worth the consideration paid for it.<sup>2</sup>

If the covenantee is a mortgagee, upon a total breach of these covenants the amount of the mortgage debt is the measure of damages.<sup>3</sup>

969. In England, the New England States, and in Michigan, however, the measure of damages for a breach of the covenant of warranty is the value of the land at the time of eviction.<sup>4</sup> In the same States the damages for a breach of the covenant for seisin is the consideration paid. The technical reason for this difference as to the rule of damages in the two cases is, that the covenant of warranty is not broken until eviction, while the covenant for seisin is broken as soon as it is made.

970. The grantee cannot recover damages for improvements he has made, nor for the increased value of the land from adventitious sources.<sup>5</sup> In an early case Chief Justice Kent said: “The purchaser may have made the purchase under the expectation of

<sup>1</sup> Sedgwick on Damages, § 951.

<sup>2</sup> Brady v. Peck (Ky.), 34 S. W. Rep. 906.

<sup>3</sup> Wetmore v. Green, 11 Pick. 462; Curtis v. Deering, 12 Me. 499.

<sup>4</sup> Jenkins v. Jones, 9 Q. B. D. 128. **Connecticut**: Horsford v. Wright, Kirb. 3, 1 Am. Dec. 8 (1786), the earliest case; Sterling v. Peet, 14 Conn. 245; Butler v. Barnes, 60 Conn. 170, 21 Atl. Rep. 419; Beecher v. Baldwin, 55 Conn. 419, 12 Atl. Rep. 401. **Maine**: Williamson v. Williamson, 71 Me. 442; Ryerson v. Chapman, 66 Me. 557; Doherty v. Dolan, 65 Me. 87; Hardy v. Nelson, 27 Me. 525; Swett v. Patrick, 12 Me. 1; Elder v. True, 32 Me. 104; Cushman v. Blanchard, 2 Me. 266, 11 Am. Dec. 76. **Massachusetts**: Gore v. Brazier, 3 Mass. 523 (1807), 3

Am. Dec. 182; Caswell v. Wendell, 4 Mass. 108; Bigelow v. Jones, 4 Mass. 512; Donahoe v. Emery, 9 Met. 63; Norton v. Babcock, 2 Met. 510; White v. Whitney, 3 Met. 81; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Boyle v. Edwards, 114 Mass. 373; Cecconi v. Rodden, 147 Mass. 164, 16 N. E. Rep. 749. **Michigan**: Eaton v. Knowles, 61 Mich. 625, 28 N. W. Rep. 740. **Vermont**: Keeler v. Wood, 30 Vt. 242; Keith v. Day, 15 Vt. 660; Park v. Bates, 12 Vt. 381, 387, 36 Am. Dec. 347; Drury v. Shumway, D. Chip. 110, 1 Am. Dec. 704.

<sup>5</sup> Copeland v. McAdory, 100 Ala. 553, 560, 13 So. Rep. 545; Carvill v. Jacks, 43 Ark. 439; Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338.

a great rise in the value of the land, of great improvements to be made by the application of his wealth, or his labor. But such expectations must have been confined to one party only, and not have entered as an ingredient into the bargain. It was the land and its price, at the time of the sale, which the parties had in view, and to that subject the operation of the contract ought to be confined. The argument in favor of the value of the land, and the improvements as they exist at the time of eviction, has generally excepted cases of extraordinary increase and of very expensive improvements. It seems to have been admitted that, without such a limitation to the doctrine, it could not be endured. But this destroys everything like a fixed rule on the subject, and places the question of damages in a most inconvenient and dangerous uncertainty."<sup>1</sup>

The general rule of damages for a breach of the covenant of warranty in its terms excludes the value of improvements, for the measure is the value of the land as determined by the parties at the time of the conveyance. On the other hand, the measure of damages established in England and New England, being the value of the land at the time of eviction, necessarily includes the value of improvements made by the purchaser prior to that time, even though made after notice of the paramount claim.<sup>2</sup>

The value or expense of improvements made by the evicted grantee cannot be recovered as a part of his damages in an action for the breach of a covenant of seisin or quiet enjoyment.<sup>3</sup> "The cost or value of improvements upon the property not being recoverable in case the entire estate is lost by the failure of the principal covenants, it is difficult to see on what principle their value or cost can be sustained when the worth of the estate is simply diminished through the failure of a subordinate covenant. In some cases the same measure of damages may be recovered upon a breach of a covenant against incumbrances as upon a breach of a covenant of seisin; for example, when the incumbrance is foreclosed and the grantee is evicted. The measure of damages

<sup>1</sup> *Pitcher v. Livingston*, 4 Johns. 1, 4 Y. Supp. 594; *Pitcher v. Livingston*, 4 Am. Dec. 229. See, also, *Staats v. Ten* Johns. 1, 4 Am. Dec. 229; *Bennet v. Eyck*, 3 Caines, 111, per Kent, C. J. Jenkins, 13 Johns. 50; *Murray v. Ballou*,

<sup>2</sup> *Cecconi v. Rodden*, 147 Mass. 164, 1 Johns. Ch. 566, 577; *Diminick v. Lockwood*, 10 Wend. 142; *Kinney v. Watts*,

<sup>3</sup> *Willson v. Willson*, 25 N. H. 229, 57 14 Wend. 38; *Peters v. McKeon*, 4 Denio, Am. Dec. 320; *Doctor v. Darling*, 22 N. 546, 550.

caused by an incumbrance cannot be greater when the grantee is not evicted than it is in the case of an eviction."<sup>1</sup>

When, in an action upon a paramount title, a recovery is had and the defendant is allowed the value of improvements made by his warrantor, such defendant, in a suit upon the covenant of warranty, should deduct the amount so allowed from the purchase-price he is entitled to recover as the measure of damages for the breach of the covenant.<sup>2</sup>

971. The damages a subsequent purchaser can recover are limited to his actual loss and to the amount of the covenantor's liability. When the suit is between the original parties, the damages are measured by the consideration they themselves have set upon the land in the consideration paid for the conveyance. But when the original grantee has sold the land to another, and the second or any subsequent purchaser has been evicted, and he brings his action against the original grantor who sold with warranty, his right of recovery is in the first place limited to his actual loss, and in the second place this cannot exceed the liability of the grantor who is sued to his immediate grantee. In other words, the damages are measured by the amount of consideration paid by the plaintiff for the land, with interest, not exceeding the amount paid the original grantor for it.<sup>3</sup>

972. Some courts hold, however, that the measure of recovery is the value of the land at the time of the conveyance by the original covenantor to the covenantee, and that that value is conclusively fixed by the consideration then paid. Under this rule, if a remote grantee should sue all the previous covenantors, his recovery would be as variable as the several amounts received by each covenantor; "and, in case the consideration paid by him to his immediate grantee is less than the consideration received by the original covenantor, his recovery would be less against such grantee than it would be in an action against the original cove-

<sup>1</sup> *Doctor v. Darling*, 22 N. Y. Supp. 594, 597, per Follett, J.

<sup>2</sup> *Ingram v. Walker* (Tex. Civ. App.), 26 S. W. Rep. 477.

<sup>3</sup> *Colorado*: *Taylor v. Wallace*, 20 Colo. 211, 37 Pac. Rep. 963. *Maryland*: *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480. *Minnesota*: *Moore v. Frankenfield*, 25 Minn. 540. *Missouri*: *Dickson v. De-*

*sire*, 23 Mo. 151. *New York*: *Jenks v. Quinn*, 61 Hun. 427, 41 St. Rep. 22, 16 N. Y. Supp. 240; *Petrie v. Fols*, 22 Jones & S. 223. And see *Greenvauld v. Davis*, 4 Hill, 643. *North Carolina*: *Williams v. Beeman*, 2 Dev. 483. *Tennessee*: *Mette v. Dow*, 9 Lea, 93; *Whitzman v. Hirsh*, 87 Tenn. 513, 11 S. W. Rep. 421. *Wisconsin*: *Eaton v. Lyman*, 26 Wis. 61.

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nantor; while, under the rule that the amount of his recovery is the amount of consideration actually paid by him for the land, not exceeding the original purchase-price, the recovery in both cases would be the same. The rule limiting the measure of damages in a case like this, where the remote grantee elects to sue the original covenantor, to the actual loss sustained by him, seems to us not only equitable, but is in principle analogous to the doctrine that applies in an action by the original covenantee. Compensation for his loss is all that any evicted grantee can reasonably ask."<sup>1</sup>

**973.** A covenantee who has conveyed the land with covenants of warranty may maintain an action against an antecedent covenantor for a breach of the covenant which occurred after he had conveyed the land, if he has been obliged to make good his own covenant to his grantee. By satisfying the covenant, it is regarded as having been restored to him, and he has his right of action against any antecedent covenantor.<sup>2</sup> If he has conveyed by quitclaim deed, so that he is not liable to his grantee, the latter, if any one, has a remedy against the antecedent grantor on the covenants in his deed.<sup>3</sup>

**974.** A purchaser who has himself perfected the title may recover of his warrantor the amount he has reasonably paid, with interest, and not the whole purchase-price of the land.<sup>4</sup> The

<sup>1</sup> *Taylor v. Wallace*, 20 Colo. 211, 37 Pac. Rep. 963, per Goddard, J. **Kentucky**: *Dougherty v. Duvall*, 9 B. Mon. 57; *Hunt v. Orwig*, 17 B. Mon. 73. **Mississippi**: *Brooks v. Black*, 68 Miss. 161, 6 So. Rep. 332. **South Carolina**: *Lowrance v. Robertson*, 10 S. C. 8.

<sup>2</sup> *Wheeler v. Sohler*, 3 Cush. 219; *Baxter v. Ryers*, 13 Barb. 267; *Clement v. Bank*, 61 Vt. 298, 17 Atl. Rep. 717.

<sup>3</sup> *Hunt v. Middlesworth*, 44 Mich. 448, 7 N. W. Rep. 57.

<sup>4</sup> **Alabama**: *Anderson v. Knox*, 20 Ala. 156; *Lewis v. Harris*, 31 Ala. 689. **Arkansas**: *Dillahunt v. Little Rock & Ft. S. Ry. Co.* 59 Ark. 629, 27 S. W. Rep. 1002; on rehearing, 28 S. W. Rep. 657; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114. **California**: *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

**Connecticut**: *Davis v. Lyman*, 6 Conn. 249. **Georgia**: *Amos v. Cosby*, 74 Ga. 793. **Illinois**: *Clapp v. Herdman*, 25 Ill. App. 509; *Claycomb v. Munger*, 51 Ill. 373, 377. **Iowa**: *Richards v. Iowa Homestead Co.* 44 Iowa, 304, 24 Am. Rep. 745; *Snell v. Iowa Homestead Co.* 59 Iowa, 701, 13 N. W. Rep. 848; *Fawcett v. Woods*, 5 Iowa, 400; *Yokum v. Thomas*, 15 Iowa, 67; *Royer v. Foster*, 62 Iowa, 321, 17 N. W. Rep. 516. **Kansas**: *Dale v. Shively*, 8 Kans. 276; *McKee v. Bain*, 11 Kans. 569. **Maine**: *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Kelly v. Low*, 18 Me. 244; *Swett v. Patrick*, 12 Me. 9. **Massachusetts**: *Smith v. Carney*, 127 Mass. 179; *Batchelder v. Sturgis*, 3 Cush. 201; *Wyman v. Brigden*, 4 Mass. 150; *Comings v. Little*, 24 Pick. 266; *Estabrook v. Smith*, 6 Gray,



covenantee can recover only the amount he actually and reasonably paid for the outstanding title. If such title is a mortgage which he has bought for less than its face, he can recover only the amount he paid for it.<sup>1</sup> Moreover, the amount he can recover is limited to the value of the land, which, by the rule generally prevailing, is the value the parties put upon it at the time of the conveyance,<sup>2</sup> though in New England this is the value at the time of the eviction.<sup>3</sup>

But, contrary to the rule above stated, it has been held in Texas that where the warrantee, pending a suit which resulted in his eviction, bought the outstanding superior title for less than the purchase-money, his recovery upon the warranty was not affected by his purchase of the title at a less sum, but that he was entitled to judgment for the purchase-money in the deed of warranty, with interest.<sup>4</sup>

In an action by the grantee to recover the amount he has paid in removing an incumbrance or in extinguishing a paramount title, the burden is upon him to show that the amount paid was reasonable.<sup>5</sup>

**975. When the eviction is by reason of a mortgage or**

572, 66 Am. Dec. 445; *Thayer v. Clemence*, 22 Pick. 490; *Harlow v. Thomas*, 15 Pick. 66. **Michigan**: *Long v. Sinclair*, 40 Mich. 569. **Minnesota**: *Kimball v. Bryant*, 25 Minn. 496. **Missouri**: *Ward v. Ashbrook*, 78 Mo. 515; *Blondeau v. Sheridan*, 81 Mo. 545, 47 Mo. App. 460; *Dickson v. Desire*, 23 Mo. 151; *St. Louis v. Bissell*, 46 Mo. 157; **Nebraska**: *Cheney v. Straube*, 35 Neb. 521, 53 N. W. Rep. 479; **New Hampshire**: *Loomis v. Bedel*, 11 N. H. 74; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320. **New Jersey**: *Hartshorn v. Cleveland*, 52 N. J. L. 473, 19 Atl. Rep. 974; *Stewart v. Drake*, 9 N. J. L. 139. **New York**: *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281; *Andrews v. Appel*, 22 Hun. 429; *Petrie v. Folz*, 22 Jones & S. 223. **North Carolina**: *Price v. Deal*, 90 N. C. 290. **Ohio**: *Lane v. Fury*, 31 Ohio St. 574. **Oregon**: *Arrigoni v. Johnson*, 6 Oreg. 167. **Rhode Island**: *Porter v. Bradley*, 7 R. I. 538. **Texas**: *McClelland v. Moore*, 48 Tex. 355; *Denson v. Love*, 58 Tex.

468; *James v. Lamb*, 2 Tex. Civ. App. 185, 21 S. W. Rep. 172. **Vermont**: *Cole v. Kimball*, 52 Vt. 639; *Turner v. Goodrich*, 26 Vt. 707. **Wisconsin**: *Eaton v. Tallmadge*, 22 Wis. 526; *Hurd v. Hall*, 12 Wis. 112; *Bailey v. Scott*, 13 Wis. 618.

<sup>1</sup> *McDowell v. Milroy*, 69 Ill. 498; *Knadler v. Sharp*, 36 Iowa, 232.

<sup>2</sup> *Grant v. Tallman*, 20 N. Y. 191; *McGary v. Hastings*, 39 Cal. 360, 369, 2 Am. Rep. 456; *Richards v. Iowa Homestead Co.* 44 Iowa, 304, 24 Am. Rep. 745; *Cox v. Henry*, 32 Pa. St. 18; *Brady v. Spurrck*, 27 Ill. 478.

<sup>3</sup> *Johnson v. Collins*, 116 Mass. 392; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Porter v. Bradley*, 7 R. I. 538.

<sup>4</sup> *Thiele v. Axell*, 5 Tex. Civ. App. 548, 24 S. W. Rep. 552.

<sup>5</sup> *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135; *Anderson v. Knox*, 20 Ala. 156; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114.

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other paramount lien, and there is time for redemption, the measure of damages is the amount payable to effect a redemption,<sup>1</sup> if that is less than the full value of the land. This is an exception to the general rule that, where there has been no eviction, and the grantee's possession has not been interfered with, he can recover only nominal damages. This exception to the rule is not made in some decisions.<sup>2</sup>

976. It is held, however, in some cases, that the grantee who has been evicted by a paramount mortgage is under no obligation to redeem, and, therefore, that he is entitled to recover the value of the land measured by the consideration paid and interest.<sup>3</sup> Although it is a rule that a party exposed to injury or damage shall make the loss as small as he reasonably can, a purchaser by warranty deed is not required to advance the money to pay a mortgage for the purpose of protecting himself or his land.<sup>4</sup>

The purchaser may recover upon his covenant, although he might have removed the incumbrance or defect of title.<sup>5</sup>

When, however, a mortgage or other paramount lien has been foreclosed and all right of redemption is gone, the rule of damages is the value of the land at the time of the conveyance by the defendant, not exceeding the consideration received by him.<sup>6</sup>

977. Where the breach of the covenant is the adjudication of the existence of a public highway over the land, the measure of damages is not the full value of the land so occupied in fee, for the easement of the public does not deprive the owner of the fee; but the correct measure of damages is the diminution, if any, in the value of the lot at the time of the eviction, caused by the assertion of the right to use the strip as a street, with

<sup>1</sup> *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Donahoe v. Emery*, 9 Met. 63; *Norton v. Babcock*, 2 Met. 510; *White v. Whitney*, 3 Met. 81, 89; *Tufts v. Adams*, 8 Pick. 547; *Curtis v. Deering*, 12 Me. 499; *Lloyd v. Quimby*, 5 Ohio St. 262; *Winslow v. McCall*, 32 Barb. 241.

<sup>2</sup> *Bundy v. Ridenour*, 63 Ind. 406; *Randell v. Mallett*, 14 Me. 51.

<sup>3</sup> *Elder v. True*, 32 Me. 104; *Stewart v. Drake*, 9 N. J. L. 139; *Miller v. Hal-*

*Wilcox v. Campbell*, 106 N. Y. 325, 12 N. E. Rep. 823, 8 N. Y. St. Rep. 885.

<sup>5</sup> *Elder v. True*, 32 Me. 104; *Blanchard v. Ellis*, 1 Gray, 195; *Miller v. Halsey*, 14 N. J. L. 48; *Wilcox v. Campbell*, 106 N. Y. 325, 12 N. E. Rep. 823; *Jenks v. Quinn*, 61 Hun, 427, 437, 16 N. Y. Supp. 240.

<sup>6</sup> *Jenks v. Quinn*, 137 N. Y. 223, 61 Hun, 427, 41 N. Y. St. Rep. 22, 16 N. Y. Supp. 240, 33 N. E. Rep. 376.

interest to the time of trial, and the costs of the action which resulted in the eviction, with interest thereon from the time of the recovery.<sup>1</sup>

**978.** If the grantee himself holds a title or incumbrance on the real estate conveyed, he cannot set up such title as a breach of the covenant of warranty, for "covenants of warranty only extend to a title existing in a third person which may defeat the estate granted by the covenantor. They do not embrace a title already vested in the covenantee."<sup>2</sup>

**979.** A purchaser is not estopped or precluded from maintaining an action upon any of the covenants in his deed by reason of having given a mortgage to his grantor for purchase-money containing similar covenants.<sup>3</sup> "It could not have been intended that the mortgage should in effect embrace and hypothecate to the vendor his own covenant assuring to his vendee the title which he then assumed to convey. As between the parties to such a transaction, the mortgage back to the vendor is to be deemed as reconveying, subject to the condition of defeasance, only such estate as is conveyed by the mortgagee to the mortgagors. It was not effectual, as between these parties, to discharge the vendor from his obligation upon the covenant of seisin, which, being then broken, gave to the mortgagors an immediate right of action."<sup>4</sup>

**980.** It is a defence to an action for a breach of the cove-

<sup>1</sup> *Hymes v. Esty*, 133 N. Y. 342, 31 N. E. Rep. 105. The court say: "It is the manner in which this easement affects the entire premises purchased which constitutes his loss, if any. It may have proved to be a benefit rather than an injury. It not infrequently happens that a lot-owner will consent to the laying out of a street across his lands, because of the convenience of access it will afford, or the creation of a new frontage for building lots, or some other compensatory advantage which it brings. If the plaintiff's entire lot is less valuable or marketable on account of the encroaching street, to that extent he should be remunerated, but beyond that there is neither reason nor justice in a demand for payment. In other words, the same rule should be ap-

plied as where a covenant against incumbrances has been broken by the existence of an easement."

<sup>2</sup> *Carson v. Cabeen*, 45 Ill. App. 262; *Smiley v. Fries*, 104 Ill. 416; *Furness v. Williams*, 11 Ill. 229; *Fitch v. Baldwin*, 17 Johns. 161; *Dillahunt v. Little Rock & Ft. S. Ry. Co.* 59 Ark. 629, 27 S. W. Rep. 1002, on rehearing 28 S. W. Rep. 657.

<sup>3</sup> *Sumner v. Barnard*, 12 Metc. 459; *Brown v. Staples*, 28 Me. 497; *Smith v. Cannell*, 32 Me. 123; *Haynes v. Stevens*, 11 N. H. 28; *Connor v. Eddy*, 25 Mo. 72; *Rawle, Cov.* (5th ed.) § 266; *Hubbard v. Norton*, 10 Conn. 422.

<sup>4</sup> *Resser v. Carney*, 52 Minn. 397, 54 N. W. Rep. 89, per Dickinson, J. See 2 *Jones on Mortgages*, §§ 1500-1505.

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nant that the purchaser has agreed to remove the incumbrance. Where, upon the execution and delivery of a deed, the purchaser retains the entire consideration, or some part of it, and holds it upon the trust and agreement that he would apply it to the payment of existing incumbrances on the land, which the grantor was bound to pay, in an action for breach of the covenant against incumbrances in a deed, evidence of such agreement is admissible in defence of the action. It does not show, or tend to show, that the incumbrance was not to be paid off by the grantor, but that it was to be paid out of his own money in the plaintiff's hands for that purpose. It does not contradict, vary, or change the effect of the deed or covenant.<sup>1</sup>

981. The grantee is entitled to recover interest on the consideration of the conveyance, as compensation for the mesne profits he is liable to account for to the true owner who has evicted him.<sup>2</sup> But if the grantee has been in the quiet possession of the land, and has received the rents and profits from the time of the execution of the deed, and is not liable to account therefor to the owner, he should not be allowed to recover interest on the consideration paid by him.<sup>3</sup>

982. If the grantee has purchased an outstanding paramount title, and has been all the time in possession, he can recover only the amount paid for such title, with interest from the time of payment.<sup>4</sup> If he has yielded possession to the person

<sup>1</sup> *Becker v. Knudson*, 86 Wis. 14, 56 N. W. Rep. 192; *Wachendorf v. Lancaster*, 66 Iowa, 458, 23 N. W. Rep. 922; *Blood v. Wilkins*, 43 Iowa, 565.

<sup>2</sup> *Staats v. Ten Eyck*, 3 Caines, 111, 115, 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. 1, 13, 4 Am. Dec. 229; *Caulkins v. Harris*, 9 Johns. 324; *Bennet v. Jenkins*, 13 Johns. 50; *Kinney v. Watts*, 14 Wend. 38, 40; *Peters v. McKeon*, 4 Denio, 546, 549; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309; *Kennison v. Taylor*, 18 N. H. 220; *Martin v. Gordon*, 24 Ga. 533; *Groesbeck v. Harris*, 82 Tex. 411, 19 S. W. Rep. 850; *Shorthell v. Ferguson*, 44 Iowa, 249; *Flint v. Steadman*, 36 Vt. 210; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. Rep. 6; *Point Street Iron Works v. Turner*, 14 R. I. 122; *Gunter v. Beard*, 93 Ala. 227, 9 So. Rep.

389; *Brooks v. Black*, 68 Miss. 161, 8 So. Rep. 332; *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Cox v. Henry*, 32 Pa. St. 18; *Morris v. Rowan*, 17 N. J. L. 304; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83.

<sup>3</sup> *McGuffey v. Humes*, 85 Tenn. 26, 1 S. W. Rep. 506; *O'Meara v. McDaniel*, 49 Kans. 685, 31 Pac. Rep. 303; *Cox v. Henry*, 32 Pa. St. 18; *Mann v. Mathews*, 82 Tex. 98, 17 S. W. Rep. 927; *Brown v. Hearon*, 66 Tex. 63, 17 S. W. Rep. 395; *Collins v. Durward*, 4 Tex. Civ. App. 339, 23 S. W. Rep. 561; *Wade v. Comstock*, 11 Ohio St. 71; *Hutchins v. Roundtree*, 77 Mo. 500.

<sup>4</sup> *Spring v. Chase*, 22 Me. 502, 39 Am. Dec. 595; *Tanner v. Livingston*, 12 Wend. 83.

having paramount title, he is entitled to interest from that time.<sup>1</sup>

Interest is not recoverable prior to eviction asserted by a judgment in ejectment, unless the plaintiff in the ejectment suit has recovered mesne profits from the grantee.<sup>2</sup>

The grantor, when sued on his covenants of warranty, cannot set off rents and profits received by the grantee from the property before he was evicted, though the true owner failed to recover for these items in his action to evict the grantee; and it is immaterial that the reason why he so failed to recover was because he occupied another tract of land of equal value.<sup>3</sup>

If the grantee has not used or occupied the land, he is entitled to interest on the price paid for it from the time it was paid.<sup>4</sup>

983. It is a general rule that a covenantor is entitled to recover the costs and expenses he has sustained in the action by which he was evicted, or in the assertion or defence of the title warranted. Such costs include reasonable counsel fees.<sup>5</sup> "In this class of cases the reasons which have led the courts to include as part of the damages the reasonable cost which the plaintiff has actually been put to in the eviction proceedings are not far to seek. The covenantor has in writing agreed to defend the title to the land conveyed. When he knows that the title is attacked in court it becomes his duty to defend it. In the words of Judge Kent,<sup>6</sup> the covenantor 'was bound to defend and protect the plaintiff and his assigns in the title he had conveyed. At common law he might have been vouched to come in, and have been substituted as a real defendant in the suit.' Under our practice the covenantor may be vouched or summoned in the eviction proceedings to defend the title, or he may voluntarily undertake the defence. If the covenantor fails or refuses to defend in the eviction proceedings, it is the duty of the defendant therein to defend the property as best he can. Under such circumstances, it

<sup>1</sup> *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284.

<sup>2</sup> *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702.

<sup>3</sup> *Rhea v. Swain*, 122 Ind. 272, 23 N. E. Rep. 776, 22 N. E. Rep. 1000.

<sup>4</sup> *Graham v. Dyer* (Ky.), 29 S. W. Rep. 346.

<sup>5</sup> *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254; *Sterling v. Peet*, 14 Conn. 245, 254.

<sup>6</sup> In an opinion given by him in the case of *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254.

is just and equitable that the plaintiff in the action for a breach of the covenant of warranty should be, to some extent at least, made good for the reasonable 'cost which he has actually been put to' in an attempt made in good faith to defend the title. It is in a very proper sense the natural and necessary consequence of the breach of covenant. It is incurred on behalf of the covenantor, and in the performance of his duty, and he, when properly cited in, can at any time put an end to the suit by compromise or otherwise, or can himself assume the cost and expense of defending the title."<sup>1</sup>

But this rule does not apply where the costs have been incurred in a proceeding to reform the deed so as to include the parcel of land from which the grantee has been evicted. Thus an action was brought against a grantee of lands for trespass on a small portion of land which both he and his grantor erroneously supposed was embraced by the description in the deed to him. After judgment for plaintiff in this action, the grantee brought a suit against the grantor to reform his deed so as to include the land and contain a covenant of warranty, and to recover damages for breach of warranty. It was held that the grantee was not entitled to attorneys' fees as items of damages paid in the suit against him for trespass, such damages having been sustained before the reformation of his deed by insertion of the covenant of warranty.<sup>2</sup>

**984.** If a covenantor has notice of a suit involving the title and fails to defend it, and the purchaser defends, the expenses incurred by him in such defence, with interest thereon, may be added to the amount of damages awarded him in his suit upon the covenant of title.<sup>3</sup> But the prevailing rule is that notice to the covenantor is not necessary to make him responsible

<sup>1</sup> *Butler v. Barnes*, 61 Conn. 399, 406, S. W. Rep. 197; *Haynes v. Stevens*, 11 21 Atl. Rep. 419, per *Torrance, J.* And N. H. 28; *Dalton v. Bowker*, 8 Nev. 190; see *Williamson v. Williamson*, 71 Me. Stebbins v. Wolf, 33 Kans. 765, 7 Pac. 442; *Ryerson v. Chapman*, 66 Me. 557; Rep. 542; *Morris v. Rowan*, 17 N. J. L. Matheny v. Stewart, 108 Mo. 73, 17 S. 304; *Holmes v. Sinnickson*, 15 N. J. L. W. Rep. 1014; *Hutchins v. Roundtree*, 313; *Robertson v. Lemon*, 2 Bush, 301. 77 Mo. 500; *Walsh v. Dunn*, 34 Ill. App. <sup>2</sup> *Butler v. Barnes*, 61 Conn. 399, 21 Atl. Rep. 419, 24 Atl. Rep. 328.

<sup>3</sup> *Winnipiscogee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. Rep. 171; *Hutchins v. Roundtree*, 77 Mo. 500.

for the expenses incurred by the grantee in defending the title warranted to him.<sup>1</sup>

985. Costs and expenses incurred by the purchaser in defending a title are not allowed where it is evident that defence is useless, and he has been notified not to defend by his grantor, who acknowledges liability on his covenants.<sup>2</sup> But other decisions are to the effect that the grantee has the right to defend the title warranted to him though the covenantor refuses to defend, and notifies the grantee that if he defends he will do so at his own expense.<sup>3</sup>

The purchaser is not entitled to costs in defending a branch of the action against him which sought to recover land not embraced in the grantor's deed.<sup>4</sup>

If the suit was groundless, and results in favor of the title warranted, the purchaser is not entitled to costs and expenses incurred in defending the suit. The grantor does not warrant that no one shall make a claim of adverse title, but only that no one shall make a claim which shall be adjudged valid and paramount to the title conveyed by his deed.<sup>5</sup>

986. Reasonable counsel fees may usually be recovered by a covenantee against the covenantor in defending the title covenanted. If it was the duty of the covenantor to defend a suit against the covenantee, and he declined or neglected to do so, and the covenantee in good faith defended them, it would seem that reasonable counsel fees should be allowed him.<sup>6</sup>

<sup>1</sup> *Boyle v. Edwards*, 114 Mass. 373; *S. E. Rep.* 68; *Threlkeld v. Fitzbugh*, 2 Ryerson v. Chapman, 66 Me. 557; *Ken-* Leigh, 451.

<sup>2</sup> *Richmond v. Ames*, 164 Mass. 467, 41 N. E. Rep. 671, citing *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Leffing-* well v. Elliott, 10 Pick. 204; *Meservey v. Snell* (Iowa), 62 N. W. Rep. 767; *Mercan-* tile Trust Co. v. South Park Residence Co. 94 Ky. 271, 22 S. W. Rep. 314; *Yo-* kum v. Thomas, 15 Iowa, 67; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470;

<sup>3</sup> *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. Rep. 1014; *Terry v. Drabenstadt*, 68 Pa. St. 400.

<sup>4</sup> *Morris v. Rowan*, 17 N. J. L. 304; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Point Street Iron Works v. Turner*, 14 R. I. 122.

<sup>5</sup> *Graham v. Dyer* (Ky.), 29 S. W. Rep. 346.

<sup>6</sup> *Smith v. Parsons*, 33 W. Va. 644, 11

*Harding v. Larkin*, 41 Ill. 413; *Lane v. Fury*, 31 Ohio St. 574; *McAlpin v. Wood-* ruff, 11 Ohio St. 120; *Swett v. Patrick*, 12 Me. 9. Otherwise in *Mississippi*: *Brooks v. Black*, 68 Miss. 161, 8 So. Rep. 332, *Cooper, J.*, saying: "Believing that the rule allowing any costs should never

If no opportunity was given to the covenantor to defend the suit, the law is more doubtful, says Chief Justice Field in a recent case in Massachusetts, "although the tendency is to allow reasonable counsel fees, if the circumstances were such as to render the employment of counsel proper."<sup>1</sup>

The grantee, when evicted, cannot recover counsel fees, as well as the value of the land, where he has called upon the grantor to defend the title and he has immediately employed competent counsel to do so.<sup>2</sup>

A mortgagor in a purchase-money mortgage may set off his expenses in defending the title, when his grantor, who has warranted the title, seeks a judgment in foreclosure of such mortgage.<sup>3</sup>

The grantee is entitled to recover for expenses actually paid for drafting and recording a discharge of a mortgage which is a breach of the covenants of the deed; but not for lost time, car fares, and the like expenses of the grantee in attending to the business.<sup>4</sup>

**987.** The statute of limitations applies to an action to recover damages for a breach of covenant of warranty of title. The provision applicable to such an action is that which appertains to an action upon a bond or obligation under seal. The action is upon the written covenant, though the breach of it is compensated for in damages.<sup>5</sup>

The grantee's cause of action on the covenant does not arise until there has been a breach of it by the assertion of a paramount title by the true owner. The grantee is not required to assert his rights against his warrantor until the paramount title was itself asserted in some way, whether by suit or by occupancy thereunder.<sup>6</sup>

have been established, we decline to extend it beyond the limits of the taxed costs of the case." And *Texas*: *Clark v. Mumford*, 62 Tex. 531.

<sup>1</sup> *Richmond v. Ames*, 164 Mass. 467, 41 N. E. Rep. 671, citing *Lindsey v. Parker*, 142 Mass. 582, 8 N. E. Rep. 745; *Boston & A. R. Co. v. Charlton*, 161 Mass. 32, 36 N. E. Rep. 688; *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. Rep. 47; *Farnum v. Peterson*, 111 Mass. 148.

<sup>2</sup> *Conrad v. Effinger*, 87 Va. 59, 12 S.

E. Rep. 2; *Finton v. Eggleston*, 61 Hun, 246, 16 N. Y. Supp. 721.

<sup>3</sup> *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. Rep. 710.

<sup>4</sup> *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. Rep. 47.

<sup>5</sup> *Thomas v. Bland*, 91 Ky. 1, 14 S. W. Rep. 955; *Guerin v. Smith*, 62 Mich. 369, 28 N. W. Rep. 906; *Davenport v. Davenport*, 52 Mich. 587, 18 S. W. Rep. 371.

<sup>6</sup> *Alvord v. Waggoner* (Tex. Civ. App.), 29 S. W. Rep. 797, affirmed (Tex.) 32



If a purchaser neglects to enforce possession within the statutory period; where at the time of the conveyance the land was in the adverse possession of another, and permits that possession to ripen by lapse of time into a good title, he is without remedy on his covenant.<sup>1</sup> Moreover, if a purchaser neglects to enforce his possession where the land is vacant, within the statutory period of limitation, he must take the consequences of his own neglect.<sup>2</sup> If for that period he neglects to take possession of land adapted to occupancy and cultivation, which has remained vacant and unoccupied, and is therefore defeated in an action brought by him to obtain possession from one claiming under a prior adverse and better title than his own, and thereupon brings suit upon the covenant of warranty against his grantor, although an action on the warranty did not accrue until the assertion of the superior title, the plaintiff's neglect in failing to take possession of the lands for so long a period, and thereby protect his title, precludes his recovery on the covenant.<sup>3</sup>

988. A covenant may be released directly or indirectly by the person entitled to enforce it. Thus a covenant of warranty ordinarily runs with the land, and passes with it to successive holders, but the last holder may release and discharge it, and thereby terminate all rights under it either in favor of himself or of any subsequent grantee of the land.<sup>4</sup> The acceptance of a conveyance subject to a specified mortgage, the consideration paid being measured by the fact that the land is thus held for the satisfaction of the debt charged upon it, thereby relinquishes the benefit of covenants of warranty, as respects such incumbrance in prior deeds. "One who by his own consent acquires and holds an estate expressly so charged cannot consistently claim that there

S. W. Rep. 872; *Clark v. Mumford*, 62 Tex. 531; *Jones v. Paul*, 59 Tex. 41; *Eustis v. Cowherd*, 4 Tex. Civ. App. 343, 23 S. W. Rep. 737. Where there has been no decision against the paramount title, and within the statutory period after its extinguishment by the covenantee he brings his action on the covenant of warranty, he is not barred by the statute of limitations. *Blondeau v. Sheridan*, 81 Mo. 545.

<sup>1</sup> *Rindskopf v. Farmer's L. & T. Co.* 58 Barb. 36.

<sup>2</sup> *Matteson v. Vaughan*, 38 Mich. 373, per Campbell, C. J.

<sup>3</sup> *Claffin v. Case*, 53 Kans. 560, 36 Pac. Rep. 1062. See, also, *Abbott v. Rowan*, 33 Ark. 593; *Shattuck v. Lamb*, 65 N. Y. 499, 22 Am. Rep. 656; *St. John v. Palmer*, 5 Hill, 599.

<sup>4</sup> *Merritt v. Byers*, 46 Minn. 74, 48 N. W. Rep. 417; *Middlemore v. Goodale*, Cro. Car. 503; *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504; *Field v. Snell*, 4 Cush. 504.

passed to him without qualification and for his benefit, as an incident of the estate so conveyed, the obligations of former covenantors to the effect that the estate should not be so charged."<sup>1</sup>

989. Whether several covenantors are bound jointly or severally or both, and whether several covenantees are entitled to the benefit of covenants jointly or severally or both, is a matter of intention to be gathered from the terms of the instrument, or from its construction with reference to the nature of the interest of the parties, or from other circumstances.<sup>2</sup> Where two or more persons covenant with another by the words "we covenant," the words indicate a joint covenant, and are to be so considered, unless, from the whole instrument, such appears not to have been the intention of the parties.<sup>3</sup>

If the deed itself sets out the interests of the several grantors which are different, the covenant of title will have reference to such interests, and will not be construed as the joint covenant of all.<sup>4</sup>

A covenant by several with one or more of their number cannot be enforced at law. These are no proper parties for a contract.<sup>5</sup>

#### X. *After-acquired Title of Grantor.*

990. An after-acquired title of a grantor who has conveyed the land by a warranty deed passes to his grantee by operation of law immediately upon his acquiring such title.<sup>6</sup> The after-

<sup>1</sup> *Merritt v. Byers*, 46 Minn. 74, 48 N. W. Rep. 417, per Dickinson, J.

<sup>2</sup> *Beresford v. Browning*, 1 Ch. D. 30; *Wilmer v. Currey*, 2 De G. & Sm. 347.

<sup>3</sup> *Enys v. Donnithorne*, 2 Burr. 1190; *Donahoe v. Emery*, 9 Met. 63, 67; *Philadelphia v. Reeves*, 48 Pa. St. 472; *Philips v. Bonsall*, 2 Binn. 138.

<sup>4</sup> *Redding v. Lamb*, 81 Mich. 318, 45 N. W. Rep. 997. "While the rule in construing covenants is to construe them most strictly against the covenantor, and most favorably to the covenantee, yet the rule should be carefully observed that covenants are to be construed as nearly as possible by the obvious intention of the parties, which must be gathered from the whole context of the instrument, interpreted according to the reasonable sense of the words." Per Long, J.

<sup>5</sup> *Abbott v. Hills*, 158 Mass. 396, 33 N. E. Rep. 592; *Eastman v. Wright*, 6 Pick. 316.

<sup>6</sup> *Pillsbury v. Alexander*, 40 Neb. 242, 58 N. W. Rep. 859; *Nicodemus v. Young*, 90 Iowa, 423, 57 N. W. Rep. 906; *Sayre v. Sheffield Land Co. (Ala.)* 18 So. Rep. 101; *Prewitt v. Ashford*, 90 Ala. 294, 7 So. Rep. 831; *Parker v. Marks*, 82 Ala. 548, 3 So. Rep. 5; *Bone v. Lansden*, 85 Ala. 562, 6 So. Rep. 611; *Chapman v. Abrahams*, 61 Ala. 114; *Blakeslee v. Insurance Co.* 57 Ala. 205; *Carter v. Chaudron*, 21 Ala. 72, 91; *Stewart v. Anderson*, 10 Ala. 504; *M'Gee v. Eastis*, 5 Stew. & P. 426; *Kennedy v. M'Cartney*, 4 Port. 141; *De Chaumont v. Forsythe*, 2 Penn. 507; *Huzzey v. Heffernan*, 143 Mass. 232, 9 N. E. Rep. 570; *Knight v. Thayer*, 125 Mass. 25; *Russ v. Alpaugh*, 118 Mass.

acquired title inures immediately to the grantee by way of estoppel. Chancellor Kent, in his Commentaries, in speaking of this estoppel, goes further than some authorities and says: "The estoppel works an interest in the land. An ejectment is maintainable on a mere estoppel. If the conveyance be with general warranty, not only the subsequent title acquired by the grantor will inure by estoppel to the benefit of the grantee, but a subsequent purchaser from the grantor, under his after-acquired title, is equally estopped, and the estoppel runs with the land."<sup>1</sup>

The grantor's acquisition of title, even after his grantee has brought suit upon the covenants, has the effect to reduce the damages the grantee can recover;<sup>2</sup> and if such acquisition wholly remedies the defect for which the suit was brought, the grantee is entitled to nominal damages only.<sup>3</sup>

The rule does not apply when the title afterwards acquired is one expressly excepted by the grantor in his prior conveyance. In subsequently acquiring and asserting that excepted title he does not allege anything inconsistent with what he has asserted in his own deed.<sup>4</sup>

991. The principle of estoppel may be invoked though the grantor's deed is without a covenant of warranty, if his deed purports to convey a particular estate which he afterwards acquires. In the Supreme Court of the United States it was said by Mr. Justice Nelson that "the principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped

369, 19 Am. Rep. 464; *White v. Patten*, 24 Pick. 324; *Somes v. Skinner*, 3 Pick. 52; *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. Rep. 212. The rule does not apply when the conveyance was invalid as being prohibited by law. *Holmes v. Johns*, 56 Tex. 41; *Atkinson v. Bell*, 18 Tex. 474.

<sup>1</sup> 4 Kent Com. 98.

<sup>2</sup> *Cornell v. Jackson*, 3 Cush. 506; 9 N. E. Rep. 570.

*King v. Gilson*, 32 Ill. 348; *Boon v. McHenry*, 55 Iowa, 202; *Overhiser v. McCollister*, 10 Ind. 41; *Baxter v. Ryerss*, 13 Barb. 267.

<sup>3</sup> *Sayre v. Sheffield Land, &c. Co. (Ala.)* 18 So. Rep. 101; *Cornell v. Jackson*, 3 Cush. 506; *Reese v. Smith*, 12 Mo. 344.

<sup>4</sup> *Huzzey v. Heffernan*, 143 Mass. 232.

from ever afterwards denying that he was so seised and possessed at the time he made the conveyance."<sup>1</sup>

This doctrine has no application when the deed does not on its face, either expressly or by necessary implication, assert a particular estate or title in the grantor or his ancestor. A deed reciting that the parties have by amicable arrangement divided among themselves the property of their father's estate, and that, to carry the agreement into effect, and in consideration of one dollar to each in hand paid, the parties have granted, sold, and conveyed "all their right, title, and interest" in the land mentioned, does not carry on its face, either in express terms or by necessary implication, a statement that the grantors or their ancestors were seised of a title in fee in the premises, and hence does not estop one of the grantors from asserting an after-acquired title in fee against one claiming under the grantee.<sup>2</sup>

It is provided by statute in several States that when a grantor was not possessed of the estate which he purported to convey by any proper deed, any estate afterwards acquired by him in the land shall inure to the benefit of his grantee.<sup>3</sup>

**992.** Aside from the estoppel arising from the conveyance of a particular estate, only a warranty deed operates to transfer an after-acquired title of the grantor. A quitclaim deed, or one purporting to pass only the right, title, and interest of the grantor, cannot have that effect, nor can a deed without covenants.<sup>4</sup>

<sup>1</sup> *Van Rensselaer v. Kearney*, 11 How. 297, 326; *Fairbanks v. Williamson*, 7 Me. 96; *Jackson v. Parkhurst*, 9 Wend. 209; *Bayley v. McCoy*, 8 Oreg. 259; *Taggart v. Risley*, 4 Oreg. 235.

<sup>2</sup> *Pendill v. Marquette County Agricultural Soc.* 95 Mich. 491, 55 N. W. Rep. 384.

<sup>3</sup> **Arkansas**: Dig. of Stats. 1894, § 699. **California**: Civ. Code, § 1106. **Colorado**: Annot. Stats. 1891, § 430. **Georgia**: Code 1882, § 2699. **Idaho**: R. S. 1887, § 2928. **Illinois**: R. S. 1889, ch. 30, § 7. **Iowa**: R. S. 1888, § 3102. **Kansas**: 1 G. S. 1889, § 1114. **Mississippi**: Code 1892, § 2438. **Montana**: Comp. Stats. 1887, p. 662, § 267; Codes 1895, Civ. Code, § 1512. **Nebraska**: Comp. Stats. 1893,

ch. 73, § 51. **North Dakota**: R. Codes 1895, § 3547. **Oklahoma**: Comp. Stats. 1893, § 1611. **Utah**: Comp. Laws 1888, § 2620.

<sup>4</sup> *Benneson v. Aiken*, 102 Ill. 284; *Holbrook v. Debo*, 99 Ill. 372; *Booker v. Tarwater*, 138 Ind. 385, 37 N. E. Rep. 979; *Stephenson v. Boody* (Ind.), 38 N. E. Rep. 331; *Locke v. White*, 89 Ind. 492; *Nicholson v. Carass*, 45 Ind. 479; *Avery v. Akins*, 74 Ind. 283; *Graham v. Graham*, 55 Ind. 23; *Shumaker v. Johnson*, 35 Ind. 33; *Bohon v. Bohon*, 78 Ky. 408; *Miller v. Ewing*, 6 Cush. 34; *Allen v. Holton*, 20 Pick. 458; *Blanchard v. Brooks*, 12 Pick. 47; *People v. Miller*, 79 Mich. 93, 44 N. W. Rep. 172; *Frost v. Missionary Society*, 56 Mich. 62, 69, 22

A statutory covenant of warranty has the same effect as an express covenant in giving the grantee the benefit of his grantor's subsequently acquired title.<sup>1</sup>

993. To effect an estoppel, the after-acquired title must have come to the grantor in the same right or capacity in which he conveyed the land. Thus, if he made the conveyance in his individual capacity, a title afterwards acquired by him as a trustee for others does not inure to the benefit of his grantee.<sup>2</sup> On this same principle, as stated by Professor Washburn,<sup>3</sup> "if, after having made a conveyance with warranty without having title, the estate comes to the grantor as a mere conduit in passing it from its owner through him to another person, it does not inure to the benefit of his original grantee."

Under a deed, by husband and wife, of the wife's land, with covenants of warranty by both, a title afterwards acquired by the husband inures by way of estoppel to the grantee, as against the grantor and all persons who hold under the grantor's deed given after the subsequent title is acquired.<sup>4</sup>

994. A wife is not estopped by her husband's warranty to acquire an outstanding superior title, and her purchase does not inure to the husband's grantee. Such a purchase is, however, regarded with suspicion, and slight circumstances may be sufficient to throw on her the burden of showing the *bona fides* of her title.<sup>5</sup>

995. An after-acquired title does not inure to the benefit of one to whom the grantor has made a fraudulent conveyance with warranty. The grantor cannot do by circuitry and indirection what the law forbids to be directly done. "He cannot avoid the claims of creditors or *bona fide* purchasers by conveying with warranty to defraud them, and afterwards acquiring the title."<sup>6</sup>

The fraud must, however, be proved; it will not be implied. Where a husband buys land from an administrator, and conveys

N. W. Rep. 189; *White v. Brocaw*, 14 Ohio St. 339; *Hope v. Stone*, 10 Minn. 141. 118, par. 50. So held in *Phillippi v. Leet*, 19 Colo. 246, 35 Pac. Rep. 540.

<sup>4</sup> *Powers v. Patten*, 71 Me. 583.

<sup>1</sup> *Pratt v. Pratt*, 96 Ill. 184; *Wadhams v. Gay*, 73 Ill. 415; *D'Wolf v. Haydn*, 24 Ill. 525.

<sup>5</sup> *Cameron v. Lewis*, 59 Miss. 134, disapproving of *Hardeman v. Cowan*, 10 S. & M. 486; *Taylor v. Eckford*, 11 S. & M. 21; *Carter v. Bustamente*, 59 Miss. 559.

<sup>2</sup> *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Sinclair v. Jackson*, 8 Cow. 543.

<sup>6</sup> *Stokes v. Jones*, 21 Ala. 731, 18 Ala. 734; *Gilliland v. Fenn*, 90 Ala. 230, 8 Su. Rep. 15.

<sup>3</sup> 3 Washburn Real Prop. (4th ed.) p.

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it with full warranty to his wife, and proper proceedings by the administrator to sell the land had not been taken, and new proceedings are instituted and another deed made to the husband, it inures to the wife, and the land cannot be sold for debts of the husband incurred since the first conveyance to her.<sup>1</sup>

996. The grantee is not entitled to the benefit of his grantor's after-acquired title if he has recovered judgment and satisfaction against his grantor for a breach of his covenant. He cannot afterwards, upon the grantor's acquiring title to the land, recover from him the land itself.<sup>2</sup>

A superior title in the vendee, or a subsequent acquisition of it by him, does not inure to the benefit of the vendor, or give him a right to recover the purchase-price.<sup>3</sup>

Where a grantor, subsequently acquiring title to land he has conveyed, gives a mortgage back for the purchase-money as part of the same transaction, the title he so acquires inures to his former grantee, subject to such mortgage for purchase-money.<sup>4</sup>

997. A grantee is not compelled to accept the after-acquired title, but may proceed upon his covenants. Thus, after a grantee, who has acquired neither title, possession, nor the right of possession, has brought suit for a breach of the covenant of seisin, he is not compelled to accept the after-acquired title in satisfaction of the already broken covenant of seisin, or in mitigation of damages recoverable for the breach.<sup>5</sup>

998. The equitable right of a purchaser to claim the bene-

<sup>1</sup> *Morris v. Jansen*, 99 Mich. 436, 58 N. W. Rep. 365.

<sup>2</sup> *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22.

<sup>3</sup> *American Asso. v. Short* (Ky.), 30 S. W. Rep. 978.

<sup>4</sup> *Elder v. Derby*, 98 Ill. 228.

<sup>5</sup> *Resser v. Carney*, 52 Minn. 397, 54 N. W. Rep. 89; *Buckingham v. Hanna*, 2 Ohio St. 551; *Burtner v. Keran*, 24 Gratt. 42, 67; *Chew v. Barnet*, 11 Serg. & R. 389, 391; *Blanchard v. Ellis*, 1 Gray, 195, 61 Am. Dec. 417; *Tucker v. Clarke*, 2 Sandf. Ch. 96; *Bingham v. Weiderwax*, 1 N. Y. 509; *Nichol v. Alexander*, 28 Wis. 118; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. Rep. 405; *Burton v. Reeds*, 20 Ind. 87, 93.

In *Resser v. Carney*, 52 Minn. 397, 54 N. W. Rep. 89, Dickinson, J., said: "The plaintiff has elected to commence an action to recover the purchase-price paid for a title, and he insists upon his legal right. We cannot understand how that perfect, absolute legal right of action, and especially after an action has been already instituted, is defeated; how the right, at the election of the grantee, to enforce his action for the breach of the covenant, is taken away or lost by any proper application of the principle that an after-acquired title inures to the benefit of the grantee by force of his covenants, and upon principles embraced within the general doctrine of estoppel."

fit of an after-acquired title of his grantor is a right of the purchaser only. "This equitable right," say the Supreme Court in Minnesota, "is one in favor of the covenantee, resting upon the estoppel of the covenantor to assert, as against him, a title to the property. If the grantee acquires nothing by the deed to him, and has and asserts a legal cause of action for covenant broken, no principle of estoppel operates against him to compel him, perhaps years afterwards, as in this case, to accept, in satisfaction of that legal cause of action, wholly or partially, a title which his covenantor may then procure. The latter, whose covenant has been wholly broken, has no right to elect, as against the covenantee, and to his prejudice, whether he will respond in damages for the breach by repaying the purchase-money, or buy in the paramount title, when the value of the property may have greatly depreciated, and compel the plaintiff to accept that title. The right of election is, and should be, with the other party. He has the benefit of the estoppel, but it is not to be imposed upon him as a burden, at the will of the party who alone is subject to the estoppel. He may elect to pursue the action at law, and recover the consideration paid for a title which was not conveyed to him."<sup>1</sup> An after-acquired title of the grantor does not inure to the grantee by way of estoppel without his consent, so as to defeat his right to maintain an action on the covenant against incumbrances, and recover the consideration paid by him, with interest.<sup>2</sup>

An after-acquired title descends to any person who holds under the first grantee, however remote from him in the line of title, and the succession is not broken by some of the intervening deeds conveying only "the right, title, and interest in the land" which the grantors had, such mode of conveyance being equivalent to a release deed at least.<sup>3</sup>

999. The ancestor's deed with covenants of title does not estop or rebut his heirs, even to the extent of assets received by descent, from asserting against his grantee a title derived from another source. Chief Justice Gray, delivering the judgment of the Supreme Court of Massachusetts, said: "At common law, a

<sup>1</sup> *Resser v. Carney*, 52 Minn. 397, 54 N. W. Rep. 89, per Dickinson, J.

*Clarke*, 2 Sandf. Ch. 96; *Nichol v. Alexander*, 28 Wis. 118, 130.

<sup>2</sup> *Blanchard v. Ellis*, 1 Gray, 195; *Burton v. Reeds*, 20 Ind. 87; *Tucker v.*

<sup>3</sup> *Powers v. Patten*, 71 Me. 583.

conveyance of land with warranty bound the grantor and his heirs to warrant the title to the lands granted, and either upon voucher, or upon judgment upon a writ of *warrantia chartæ*, in case of eviction of the grantee, to yield him other lands of equal value. The warranty was lineal, when the title asserted by the heir was derived, or might by possibility have been derived, from the warranting ancestor; and collateral, when it neither was nor could have been derived from him. In both lineal and collateral warranty, the heir was bound to yield other lands, in case of eviction, only if and so far as he had other lands by descent from the warrantor. . . . A lineal warranty estopped the heir to assert title to the lands warranted, although he took no other lands by descent; for to allow him to recover the lands warranted would allow him to take those lands by descent, contrary to his ancestor's warranty; and the common law (by a rule the justice of which is not apparent) held him equally barred and estopped in the case of a collateral warranty, upon the mere presumption that he might hereafter take assets by descent from or through the same ancestor." But the English doctrine of "lineal and collateral warranties" was never adopted in American jurisprudence.<sup>2</sup>

<sup>1</sup> *Russ v. Alpaugh*, 118 Mass. 369, 372.

<sup>2</sup> 3 Washburn's Real Prop. 5th ed. p. 514.



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